

25-7-7
No. 12222

United States
Court of Appeals
for the Ninth Circuit

LOEW'S, INCORPORATED, a Corporation,
Appellant,

VS.

LESTER COLE,
Appellee.

Transcript of Record

In Two Volumes
VOLUME I.
(Pages 1 to 498, Inclusive)

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED
MAY 31 1949

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles 15, Calif. [1 *]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California,
In and For the County of Los Angeles

No. 8005-Y

LESTER COLE,

Plaintiff,

vs.

LOEW'S INCORPORATED, a Corporation; DOE
ONE; DOE TWO,

Defendants.

COMPLAINT

For Declaratory and General Equitable Relief—
539099

Plaintiff complains of defendants, and for cause
of action, alleges:

I.

Plaintiff is a resident of the County of Los Angeles, State of California. Plaintiff is by profession a writer, and has had long experience in working as a writer in the motion picture industry. Defendant, Loew's Incorporated, is a corporation organized under the laws of Delaware; it maintains a principal office and transacts business in the County of Los Angeles, State of California. It is engaged, among other things, in the business of producing motion pictures. Plaintiff does not know the true names of the defendants herein sued under the names of Doe One and Doe Two; on discovery of the true names the plaintiff will seek leave to amend this complaint. [2]

The contract herein referred to was executed and each and every act herein alleged was done, in the County of Los Angeles, State of California.

II.

On or about December 5, 1945, plaintiff and defendants entered into a contract, a copy of which is attached hereto as Exhibit "A"; that contract was amended in writing by mutual consent of the parties effective as at August 21, 1947, and a copy of said amendment is attached hereto, marked Exhibit "B".

III.

On and after the said 5th day of December, 1945, plaintiff and defendants undertook to perform their respective obligations under the contract of employment. Until the 2nd day of December, 1947, the plaintiff well and truly performed each and every obligation of the said contract; thereafter further employment on the part of the plaintiff was prevented by the acts of the defendants more particularly alleged herein.

IV.

A controversy affecting the rights of the parties under the said agreement now exists in this: on or about the 2nd day of December, 1947, the defendants sent to the plaintiff the following writing:

“Loew’s Incorporated
Metro-Goldwyn-Mayer Pictures
Culver City, California

Mr. Lester Cole
c/o Metro-Goldwyn-Mayer Studios
Culver City, California

Dear Mr. Cole:

At a recent hearing of a committee of the House of Representatives, you refused to answer certain [3] questions put to you by such committee.

By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.

Very truly yours,

LOEW'S INCORPORATED,
By LOUIS K. SIDNEY,
Asst. Treasurer.

No agreement or order will be binding on this corporation unless in writing and signed by an officer." [4]

By such writing (here called the notice of suspension) the defendants purported to exercise a right

to suspend the plaintiff's employment and payment of compensation to the plaintiff. Defendants contend and assert that on December 2nd, 1947, they had, and that they now have, the right to suspend and to continue to suspend the plaintiff's employment and to suspend and to continue to suspend payment of compensation to the plaintiff.

Each and every statement of fact contained in the said notice of suspension is false and untrue, and the plaintiff so contends; the plaintiff further contends, notwithstanding the truth or falsity of any such statement in the said notice of suspension, the defendants did not on December 2, 1947. or at any other time have the right to suspend, and the defendants do not have the right to continue to suspend, the plaintiff's employment or payment of compensation to the plaintiff for any of the purported reasons, grounds, or conditions stated in the said notice of suspension; and the plaintiff further contends that no grounds or reasons existed on December 2, 1947, and none has existed since, and none exists now which gave or gives the defendants or any of them any right to suspend either the plaintiff's employment or payment of his compensation.

V.

The plaintiff was and is ready, able, and willing to continue to perform each and every obligation by him undertaken in the said contract of employment.

VI.

By reason of the said controversy and unless this Court shall grant the relief herein prayed for, the plaintiff will be irreparably injured in that by reason

of said purported suspension plaintiff is required to refrain from seeking [5] employment elsewhere and is required to remain uncompensated and unemployed and is prevented from finding gainful employment in the motion picture industry and is prevented from writing and selling any literary material to any other motion picture producer, publisher, or theatrical producer.

Wherefore, plaintiff prays for a judgment declaring that the defendants do not have and never had any right to suspend either the plaintiff's employment or payment of his compensation, and that the plaintiff is entitled to compensation at the rate provided in the said contract of employment from December 5, 1945, to the date of judgment to be rendered in this action, giving the defendant credit for compensation heretofore paid pursuant to the said contract and for an injunction pendente lite enjoining defendants from further performing said notice of suspension and for a permanent injunction enjoining defendants from continuing in effect said notice of suspension and requiring them to set the same aside and for such other relief as may seem meet and proper, together with plaintiff's costs incurred herein.

KENNY & COHN,
CHARLES J. KATZ,
BARTLEY C. CRUM,
GALLAGHER, MARGOLIS,
McTERNAN & TYRE,

By CHARLES J. KATZ,
Counsel for the Plaintiff. [6]

EXHIBIT "A"

Agreement executed at Culver City, California, December 5, 1945, by and between Loew's Incorporated, a Delaware corporation, hereinafter referred to as the "producer" and Lester Cole, hereinafter referred to as the "employee",

Witnesseth:

For and in consideration of the covenants, conditions and agreements hereinafter contained and set forth, the parties hereto have agreed and do hereby agree as follows:

1. The producer hereby employs the employee to render his exclusive services as herein required for and during the term of this agreement and the employee hereby accepts such employment and agrees to keep and perform all of the duties, obligations and agreements assumed and entered into by him hereunder.

2. The employee agrees that throughout the term hereof he will write stories, adaptations, continuities, scenarios and dialogue and that he will render such other services in the editorial department of the producer as the producer may request; that when and as requested by the producer he will render his services as a producer and/or associate producer and in such other executive ~~and/or other~~ [L.C.] capacity, or capacities, as the producer may require and as the employee may be capable of performing; that he [7] ~~that he~~ will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection herewith; and that he will perform and

of said purported suspension plaintiff is required to refrain from seeking [5] employment elsewhere and is required to remain uncompensated and unemployed and is prevented from finding gainful employment in the motion picture industry and is prevented from writing and selling any literary material to any other motion picture producer, publisher, or theatrical producer.

Wherefore, plaintiff prays for a judgment declaring that the defendants do not have and never had any right to suspend either the plaintiff's employment or payment of his compensation, and that the plaintiff is entitled to compensation at the rate provided in the said contract of employment from December 5, 1945, to the date of judgment to be rendered in this action, giving the defendant credit for compensation heretofore paid pursuant to the said contract and for an injunction pendente lite enjoining defendants from further performing said notice of suspension and for a permanent injunction enjoining defendants from continuing in effect said notice of suspension and requiring them to set the same aside and for such other relief as may seem meet and proper, together with plaintiff's costs incurred herein.

KENNY & COHN,
CHARLES J. KATZ,
BARTLEY C. CRUM,
GALLAGHER, MARGOLIS,
McTERNAN & TYRE,

By CHARLES J. KATZ,
Counsel for the Plaintiff. [6]

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Witnesseth:

For and in consideration of the covenants, conditions and agreements hereinafter contained and set forth, the parties hereto have agreed and do hereby agree as follows:

1. The producer hereby employs the employee to render his exclusive services as herein required for and during the term of this agreement and the employee hereby accepts such employment and agrees to keep and perform all of the duties, obligations and agreements assumed and entered into by him hereunder.

2. The employee agrees that throughout the term hereof he will write stories, adaptations, continuities, scenarios and dialogue and that he will render such other services in the editorial department of the producer as the producer may request; that when and as requested by the producer he will render his services as a producer and/or associate producer and in such other executive ~~and/or other~~ [L.C.] capacity, or capacities, as the producer may require and as the employee may be capable of performing; that he [7] ~~that he~~ will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection herewith; and that he will perform and

Exhibit "A"—(Continued)

render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer. The term "photoplays" as used in this agreement shall be deemed to include, but not be limited to, motion picture productions produced and/or exhibited and/or transmitted with sound and voice recording, reproducing and/or transmitting devices, television, radio devices and all other improvements and devices which are now or hereafter may be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions.

3. The employee expressly agrees that he will render his services solely and exclusively for the producer throughout the term hereof, and that during said term he will not render services of any kind or nature whatsoever either to or for himself or to or for any person, firm or corporation other than the producer, without the written consent of the producer first had and obtained. The employee further agrees that he will not consent to nor permit any other person to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices or otherwise, that he has contracted to do any act or perform any services contrary to the terms of this agreement. The producer shall have the right to institute any legal proceedings, in the name of the employee or otherwise, to prevent such acts or any of [8] them. The employee agrees not to engage or use any publicity representative nor to issue or permit

Exhibit "A"—(Continued)

the issuance of any advertising, exploitation or publicity whatsoever concerning the employee during the term of this agreement, without the prior written consent of the producer first had and obtained.

4. The producer, its successors and assigns, shall, in addition to the employee's services, be entitled to and shall own solely and exclusively all of the results and proceeds thereof (including all rights throughout the world of production, recordation, broadcasting and reproduction by any art or method, copyright, trademark and patent), whether such results and proceeds consist of literary, dramatic, musical, motion picture, mechanical or any other form of works, themes, ideas, compositions, creations or products; and the employee does hereby assign and transfer to the producer all of the foregoing without reservation, condition or limitation. In the event that the producer shall desire to secure separate assignments of any of the foregoing, the employee shall execute and deliver the same to the producer upon the producer's request therefor. As to literary and/or dramatic material such assignments shall be substantially similar to Exhibit "A" which is hereunto attached, hereby referred to and by this reference made a part hereof; provided, however, that except as to original stories any and all warranties contained in said Exhibit "A" shall be deemed to be amended to read as follows:

"I agree and warrant that except as provided in the next sentence hereof all material composed and/or submitted by me hereunder for or

Exhibit "A"—(Continued)

to the purchaser shall be wholly original with me and shall not infringe upon or violate the right of privacy of, or constitute a libel or slander against or violate any common law rights or any other rights of any person, firm or corporation. The same agreements and warranties are made by me with reference to any and all [9] material, incidents, treatment, character and action which I may add to or interpolate in any material assigned to me by the purchaser for preparation, but are not made with respect to violations or infringements contained in the material so assigned to me by the purchaser. I agree that all material composed, submitted, added and/or interpolated by me hereunder shall automatically become the property of the purchaser who, for this purpose, shall be deemed the author thereof, I acting entirely as the purchaser's employee."

The employee further agrees to execute and deliver to the producer in connection with all literary material written by him hereunder, a certificate in substantially the following form:

"I hereby certify that I wrote the manuscript hereto attached, as an employee of Loew's Incorporated, pursuant to an agreement dated the day of, 19. . . . , in performance of my duties thereunder, and in the regular course of my employment and that said Loew's Incorporated is the author thereof and entitled to the copyright therein and thereto, with the right to

Exhibit "A"—(Continued)

make such changes therein and such uses thereof as it may determine as such author.

"In Witness Whereof I have hereto set my hand this day of, 19. . . ."

It is further understood and agreed that with respect to all literary material written by the employee hereunder all of the rights, privileges, warranties and agreements granted, made and/or set forth in said Exhibit "A" shall vest in and inure to the benefit of the producer forthwith upon the creation or submission of such material, whether or not the employee executes such assignment. The producer shall have the further exclusive right to use and display the name, voice and likeness of the employee for advertising, commercial and/or publicity purposes during the term of employment and perpetually in connection with all work of the employee hereunder. The employee shall not transfer or attempt to transfer any right, privilege, title or interest in or to any of the things above specified, nor shall he at any time grant the right to, authorize or willingly permit any person, firm or corporation other [10] than the producer in any way to infringe upon such exclusive rights hereby granted to the producer, and authorizes the producer in the name of the employee, or otherwise, to institute any legal proceedings to prevent such infringement. All rights herein granted to the producer shall vest in the producer, whether this agreement is terminated by the completion of all services herein agreed to be performed by the employee, or is sooner terminated by virtue of any right of termination herein granted to the producer, or otherwise.

Exhibit "A"—(Continued)

5. The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

6. The employee hereby expressly gives and grants to the producer the right to lend the services of the employee to any other person or persons, in any capacity in which the employee is required to render his services hereunder, upon the distinct understanding and condition, however, that this contract shall nevertheless continue in full force and effect and that the employee shall not be required to do any act or perform any services contrary to the provisions of this agreement. Any breach by any such person, however, of any of the terms of this agreement shall not constitute a breach by the producer of its obligations or covenants under this agreement, nor shall the employee have the right to terminate this agreement [11] by reason of any such breach by any such person, but the employee, at his option, in the event of such breach by any such person shall be released from the obligation to render further services to such person. In the event that the employee is required to render services for any other person or persons as hereinabove provided, he agrees to render the same to the best of his ability. Should the services of the employee be loaned to any other person or per-

Exhibit "A"—(Continued)

sons hereunder, such other person or persons, at the option of the producer, shall be entitled to all or any of the advertising and other rights in connection with services rendered by the employee for such other person or persons as are given to the producer under the terms of this agreement.

7. In the event that the producer desires, at any time or from time to time, to apply in its own name or otherwise, but at its own expense, for life, health, accident or other insurance covering the employee, the employee agrees that the producer may do so and may take out such insurance for any sum which the producer may deem necessary to protect its interests hereunder. The employee shall have no right, title or interest in or to such insurance, but agrees nevertheless to assist the producer in procuring the same by submitting to the usual and customary medical and other examinations and by signing such applications and other instruments in writing as may reasonably be required by such insurance company or companies.

8. In the event that by reason of mental or physical disability, or otherwise, the employee shall be incapacitated from fully performing the terms hereof or complying with each and all of his obligations hereunder, then this [12] agreement shall be suspended during the period of such disability of incapacity, and no compensation need be paid the employee during the period of such suspension. The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any

Exhibit "A"—(Continued)

part of the period of such suspension. The producer, at its option, in the event of the continuance of such disability or incapacity for a period or aggregate periods in excess of two (2) weeks during any year of the term hereof, may cancel and terminate this employment. In the event of the occurrence of any disability or incapacity of the employee, the employee shall give the producer written notice of such disability or incapacity within twenty-four (24) hours after the commencement thereof. In the absence of such notice any failure of the employee (whether or not caused by his disability or incapacity) to report to the producer as and when instructed by the producer, for the rendition of his required services hereunder, may, at the producer's option (unless because of such disability or incapacity the producer expressly excuses the employee from reporting for work or expressly dismisses the employee from work) be treated by the producer as failure, refusal and/or neglect of the employee in the performance of his obligations and agreements hereunder and shall entitle the producer to exercise any and all rights and/or remedies which, in the event of failure, refusal or neglect, are available to the producer under the provisions of paragraph 11 hereof or at law or in equity. The producer shall have the right, at its option, to have the employee [13] examined at any time and from time to time by such physician or physicians as the producer may designate. The employee agrees to make himself available for any and all such examinations as and when requested and to submit to such examinations and tests

Exhibit "A"—(Continued)

as such physician or physicians may deem desirable.

9. In the event that at any time during the term hereof the producer, or any person to whom the services of the employee are loaned by the producer hereunder, should be materially hampered, interrupted or interfered with in the preparation, production or completion of photoplays by reason of any fire, casualty, lockout, strike, labor conditions, unavoidable accident, riot, war, act of God, or by the enactment of any municipal, state or federal ordinance or law, or by the issuance of any executive or judicial order or decree, whether municipal, state or federal, or by any other legally constituted authority, or by any national or local emergency or condition, or by any other cause of the same or any similar kind or character, or if for any reason whatsoever the majority of the motion picture theatres in the United States shall be closed for a week or any period in excess of a week, then and in any of said events this agreement, at the option of the producer, may be suspended likewise during the continuance of such event or events, no compensation need be paid the employee during the period of such suspension, and the term of this agreement, at the option of the producer, may be continued and extended, upon the same terms and conditions as shall then be operative hereunder, [14] for a period equivalent to all or any part of any period or periods during which any such event or events shall continue. If such suspension or suspensions or any such event or events should continue for a period or aggregate of periods in excess of twelve (12) weeks during any year of the

Exhibit "A"—(Continued)

term hereof, then and in that event either the employee or the producer, at his or its option, may elect to terminate the employee's employment hereunder; provided, however, that should the employee desire to elect to terminate his employment he shall serve notice of such desire upon the producer at or after the expiration of such period or periods, and if the producer should not resume the payment of the weekly compensation hereinafter specified, commencing as of not later than one (1) week after the receipt of such notice from the employee, then and in that event the employment of the employee hereunder shall be terminated. If the producer should resume the payment of such compensation, commencing as of not later than one (1) week after the receipt of such notice, then and in that event the employment of the employee hereunder shall not be terminated, but shall continue in full force and effect.

10. Notwithstanding anything elsewhere contained herein, it is expressly agreed that if at the time of the expiration of this agreement the employee is engaged in the rendition of any of his required services hereunder in connection with any matter or thing not then completed, and if the producer shall not then have exercised an option for the further services of the employee for a further period, then and in that event the employee's employment hereunder, at the option of the producer, may be continued and extended, at the same rate of salary and upon [15] the same conditions as shall be operative hereunder immediately prior to the time of such expiration, until the completion of such of the employee's required

Exhibit "A"—(Continued)

services hereunder as the producer may desire in connection therewith, not exceeding sixty (60) days.

11. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by the employee under the terms herof, and the rights and privileges granted to the producer by the employee under the terms hereof, are of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and that a breach by the employee of any of the provisions contained in this agreement will cause the producer irreparable injury and damage. The employee hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the employee. Resort to injunctive and other equitable relief, however, shall not be construed as a waiver of any other rights that the producer may have in the premises, for damages, or otherwise. In the event of the failure, refusal or neglect of the employee to perform his required services or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions [16] for a period equivalent to all or any part of the period during

Exhibit "A"—(Continued)

which such failure, refusal or neglect continues. If at the time of such failure, refusal or neglect, the employee shall have been instructed to render any of his required services hereunder, the producer shall have the right to refuse to pay the employee any compensation for and during the time which would have been reasonably required to complete such services, or (should another person be engaged or instructed to perform such services) until the completion of such services by such other person, and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof. Should the producer notify the employee that the employee has been scheduled to perform any of his required services hereunder, and should the employee thereupon or at any time prior to the designated date of commencement of the rendition of such services advise the producer that the employee does not intend to render such services, the producer shall thereupon or at any time thereafter have the right to refuse to pay the employee any compensation commencing as of the date on which the employee has so advised the producer of his intent not to perform, or at the producer's election, as of any time thereafter, and continuing until the expiration of the time which would have been reasonably required to complete such services, or (should another person be engaged or instructed to perform such services) until the completion of the rendition of such services by such other person; and in any or either of such events the producer shall also have

Exhibit "A"—(Continued)

the right to extend the term of this agreement and [17] all of its provisions for a like period of time, or any portion thereof. Any period for or during which the producer is entitled to refuse to pay compensation to the employee pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the employee shall be requested by the producer to, and shall render, other services hereunder. The producer shall also have the right, at its option, to extend the term of this agreement and all of its provisions for a period of time equivalent to all or any part of any leave or leaves of absence granted the employee by the producer during the term hereof. Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or remedy allowed by law. All options granted to the producer herein for extending the term of this agreement, other than the options hereinafter in paragraph 18 specifically set forth, may be exercised by the producer by notice in writing to be served upon the employee at any time prior to the expiration of the term hereof.

12. If this agreement be suspended or if the producer refuse to pay the employee compensation, pursuant to any right to do so herein granted to the producer, or if the producer grant any leave of absence to the employee, and if in connection with such suspension, refusal to pay or leave of absence the producer shall exercise the right to extend this agreement for a period equivalent to all or any part

Exhibit "A"—(Continued)

of the period of such suspension, refusal to pay or leave of absence, then and in that event the running of the then current term or period of the employee's employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to [18] pay or leave of absence, but shall be resumed immediately upon the expiration of such suspension or leave of absence, or (in case of any such refusal to pay) upon the resumption of the payment of compensation, and (subject to subsequent extension or termination for proper cause) shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay or leave of absence, less a period equal to that portion, if any, of the period of such suspension, refusal to pay or leave of absence for which the producer does not exercise the right to extend this agreement. In the event of any such extension the dates for the exercise of any subsequent options and the dates of the commencement of any subsequent optional period or periods of employment hereunder shall be postponed accordingly. During the period of any such suspension, refusal to pay or leave of absence the employee shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained. Should the producer pay any money or compensation to the employee for or during all or any part of any period in which this agreement is suspended, or in which the employee is not entitled to compensation, or in

Exhibit "A"—(Continued)

which the producer is entitled to refuse to pay compensation to the employee, then and in that event, at the option of the producer, the money and/or compensation so paid the employee shall be returned by the employee to the producer upon demand, or the same may be deducted by the producer from any compensation earned hereunder by the employee [19] after such period, but this provision shall not be deemed to limit or exclude any other rights of credit or recovery, or any other remedies the producer otherwise may have. Wherever in this agreement reference is made to the phrases "the term hereof", "the term of this agreement", or other phrases of like tenor, such reference (unless a different meaning clearly appears from the context) shall mean and be deemed to refer to the original period of the employee's employment hereunder and/or to whichever of the optional periods of employment provided for in paragraph 18 hereof may be current at the time referred to.

13. No waiver by the producer of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

14. All notices which the producer is required or may desire to serve upon the employee under or in connection with this agreement may be served by addressing the same to the employee at such address as may be designated from time to time in writing by the employee, or if no such address be designated in writing by the employee, or, if having designated an

Exhibit "A"—(Continued)

of the period of such suspension, refusal to pay or leave of absence, then and in that event the running of the then current term or period of the employee's employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to [18] pay or leave of absence, but shall be resumed immediately upon the expiration of such suspension or leave of absence, or (in case of any such refusal to pay) upon the resumption of the payment of compensation, and (subject to subsequent extension or termination for proper cause) shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay or leave of absence, less a period equal to that portion, if any, of the period of such suspension, refusal to pay or leave of absence for which the producer does not exercise the right to extend this agreement. In the event of any such extension the dates for the exercise of any subsequent options and the dates of the commencement of any subsequent optional period or periods of employment hereunder shall be postponed accordingly. During the period of any such suspension, refusal to pay or leave of absence the employee shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained. Should the producer pay any money or compensation to the employee for or during all or any part of any period in which this agreement is suspended, or in which the employee is not entitled to compensation, or in

Exhibit "A"—(Continued)

which the producer is entitled to refuse to pay compensation to the employee, then and in that event, at the option of the producer, the money and/or compensation so paid the employee shall be returned by the employee to the producer upon demand, or the same may be deducted by the producer from any compensation earned hereunder by the employee [19] after such period, but this provision shall not be deemed to limit or exclude any other rights of credit or recovery, or any other remedies the producer otherwise may have. Wherever in this agreement reference is made to the phrases "the term hereof", "the term of this agreement", or other phrases of like tenor, such reference (unless a different meaning clearly appears from the context) shall mean and be deemed to refer to the original period of the employee's employment hereunder and/or to whichever of the optional periods of employment provided for in paragraph 18 hereof may be current at the time referred to.

13. No waiver by the producer of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

14. All notices which the producer is required or may desire to serve upon the employee under or in connection with this agreement may be served by addressing the same to the employee at such address as may be designated from time to time in writing by the employee, or if no such address be designated in writing by the employee, or, if having designated an

Exhibit "A"—(Continued)

address, the employee cancels the same and fails to designate a new address in writing, then by addressing the same to the employee at any place where the producer has a studio or an office and, in any case, by depositing the same so addressed, postage prepaid, in the United States mail, or by sending the same so addressed by telegraph or cable or, at its option, the producer may deliver the same to the employee personally, either in writing or, unless otherwise specified herein, orally. If the producer elect to mail such notice or to send the [20] same by telegraph or cable, such notice shall be deemed to have been served upon the employee on the date of the mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, and for this purpose the employee designates and appoints the United States Postoffice, or telegraph or cable company, as the case may be, his agent to receive such notices.

15. Nothing in this contract contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material present or future statute, law, governmental regulations or ordinance, contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

16. The producer may transfer or assign all or any part of its rights hereunder to any person, firm or

Exhibit "A"—(Continued)

corporation, and this agreement shall inure to the benefit of the producer, its successors or assigns.

17. On condition that the employee shall fully and completely keep and perform each and every term and condition of this agreement on his part to be kept or performed, the producer agrees to compensate the employee therefor and for all rights herein granted and/or agreed to be granted by the employee to the producer at the rate of One Thousand, One Hundred Fifty and 00/100 Dollars (\$1,150.00) per week during each year of the term, payable for each week during which the employee shall have actually rendered his services hereunder. Conditioned as aforesaid, the producer agrees that compensation will be paid to the employee for a period or aggregate of periods of not less than forty (40) weeks during each year of the original term hereof, [21] ~~and for a period or aggregate of periods of not less than twenty (20) weeks during each six (6) months optional period of employment for which an option is exercised hereunder, and for a period or aggregate of periods of not less than forty (40) weeks during each one (1) year of each optional period of employment for which an option is exercised hereunder.~~ In computing compensation to be paid or deducted with respect to any period of less than a week, the weekly rate shall be prorated, and for this purpose the rate per day shall be one-sixth (1/6th) of the weekly rate. If during the original term hereof or during any optional period of employment for which an option is exercised hereunder this agreement be suspended pursuant to any provision for suspension herein con-

Exhibit "A"—(Continued)

tained, or if the producer refuse to pay the employee compensation pursuant to any right to do so herein granted to the producer, then the minimum periods hereinabove specified during which the producer is obligated to pay compensation to the employee shall be reduced by a period equivalent to the period or aggregate of periods of such suspension or suspensions or refusal to pay. Any compensation due the

Thursday
employee hereunder shall be payable on ~~Wednesday~~
of each week for services rendered up to and including the Saturday preceding. During any period or periods in which the employee is not entitled to compensation pursuant to the provisions of this paragraph, he shall be deemed to be laid off without pay, and during such periods, of course, the employee shall not have the right to render his services for any person, firm or corporation without the written consent of the producer first had and obtained.

18. The term of employment hereunder shall be deemed to have commenced on November 15, 1945, and shall continue for a period of two years from and after said date. In consideration of [22] the execution of this agreement by the producer and of the consent of the producer to the amount of compensation herein set forth, the employee hereby gives and grants to the producer the following rights or options:

(a) To extend the term of employment of the employee for an additional period of two (2) years from and after the expiration of the term hereinbefore specified, upon the same terms and conditions

Exhibit "A"—(Continued)

as herein contained, except that compensation shall be paid to the employee for this first extended period at the rate of One Thousand, Three Hundred Fifty Dollars (\$1,350.00) per week.

(b) To extend the term of employment of the employee for an additional period of two (2) years from and after the expiration of said first extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the employee for this second extended period at the rate of One Thousand, Five Hundred Fifty Dollars (\$1,550.00) per week.

(c) To extend the term of employment of the employee for an additional period of one (1) year from and after the expiration of said second extended period, upon the [23] same terms and conditions as herein contained, except that compensation shall be paid to the employee for this third extended period at the rate of One Thousand, Eight Hundred Dollars (\$1,800.00) per week.

~~(d) To extend the term of employment of the employee for an additional period of () from and after the expiration of said third extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the employee for this fourth extended period at the rate of Dollars (\$) per week.~~

~~(e) To extend the term of employment of the employee for an additional period of () from and after the expiration of said fourth extended period, upon the same terms and conditions as herein~~

Exhibit "A"—(Continued)

~~contained, except that compensation shall be paid to the employee for this fifth extended period at the rate of Dollars (\$.....) per week.~~

(f) ~~To extend the term of employment of the employee for an additional period of () from and after the expiration.~~ [24] Each option hereinabove referred to may be exercised separately at any time, but not later than thirty (30) days prior to the expiration of the respective next preceding term of employment. If any such term is extended as provided in this agreement, the period of thirty (30) days referred to in the next preceding sentence shall be the period of thirty (30) days prior to the expiration of all extensions of such term, whether the right to such extension or extensions accrued or was exercised before, on or after the date which in the absence of such extension or extensions would have been the latest date for the exercise of such option. The producer at any time within which any of said options may be exercised, may elect to exercise all or any of the options not already exercised, in which event the term of this agreement shall be extended by the period or periods specified in the option or options so exercised by the producer. The exercise by the producer of any one or more of said options shall not be construed as an election by it not to exercise the remaining options and shall not be construed to be a waiver of any prior breach by the employee, whether known or unknown, of any provision of this agreement or a ratification of any prior course of conduct by the employee. All notices of the

Exhibit "A"—(Continued)

exercise of any option shall be in writing and shall be served upon the employee within the periods above specified.

19. The employee warrants and represents to the producer and agrees that the employee is a member in good standing of the Screen Writer's Guild, Inc., and will remain so during any and all periods that his services are required as a writer hereunder. [25]

20. The Producer-Screen Writers' Guild, Inc., Minimum Basic Agreement of 1942 (as it may from time to time hereafter be modified, amended or extended) is hereinafter referred to as the "Basic Agreement". The provisions of Article 5 of said Basic Agreement shall govern the determination of such credits as a writer, if any, as the producer shall accord the employee hereunder; it being agreed, however, that with respect to credits not finally determined during the term of said Basic Agreement, and with respect to credits finally determined at any time when the producer shall have ceased to be a party to said Basic Agreement or when said Basic Agreement is not effective as between the producer and the Guild, any screenplay credits to the employee as a writer shall be determined in accordance with the provisions of Exhibit "X" attached hereto.

21. If, during the term hereof, the employee shall notify the producer in writing that the employee desires to take a leave of absence and if such request shall be granted by the producer then, unless the producer in granting such leave of absence shall advise the employee to the contrary, the employee may, during such leave of absence, engage in the

Exhibit "A"—(Continued)

writing of literary and/or dramatic material for himself but shall not have the right to accept employment with or engage in the writing or preparation of literary or dramatic material for any person, firm or corporation other than the producer. It is expressly understood that nothing contained in this paragraph shall obligate the employee to request any leave of absence whatsoever [26] nor shall anything in this paragraph be construed so as to obligate the producer to grant the author any leave of absence requested by him. The employee agrees that promptly upon the completion of any and all literary and/or dramatic material written by him, as aforesaid, during any such leave of absence, he will submit the same to the producer. The producer shall have the right, to be exercised by notice in writing to be served upon the employee at any time within thirty (30) days after such submittal, to purchase, for a price to be agreed upon between the employee and the producer, all rights of every kind in and to such material, including specifically, but not limiting the same to, the sole and exclusive motion picture, sound, radio, television and spoken stage rights therein throughout the world, or such of said rights therein as the producer may elect to acquire. If the producer does not elect to purchase such rights, or any of them, within said period of thirty (30) days, or if a price cannot be agreed upon between the employee and the producer, the employee shall have the right to negotiate for the sale of such rights, or any of them, to others than the producer; provided, however, that such rights shall not, nor shall any of them, be sold,

Exhibit "A"—(Continued)

licensed or conveyed to anyone other than the producer unless and until, in each instance, the producer shall have been given an opportunity and shall have failed to avail itself thereof within forty-eight (48) hours (excluding Sundays and holidays) after such opportunity is presented to the producer in writing to purchase the rights so proposed to be sold, licensed or conveyed, for a price at least as favorable as that contained [27] in the offer which the employee contemplates accepting from such other person. Any such offer, in order to foreclose the rights of the producer, as above provided, must of course be bona fide. With respect to any and all material and rights purchased by the producer pursuant to the foregoing provisions of this paragraph, the employee agrees to execute and deliver to the producer such assignment or assignments of such material and/or rights and such other instruments as in the sole judgment and discretion of the producer may be deemed necessary or expedient for the transfer to the producer of the material and/or rights so purchased; it being expressly agreed that all material and/or rights so purchased by the producer shall vest in and inure to the benefit of the producer forthwith upon the purchase thereof by the producer whether or not such assignments and/or other instruments be executed by the employee or delivered to the producer, and the employee shall be deemed to have made the same warranties and representations to the producer with respect to the originality and authorship of such material and the employee's ownership thereof as are set forth in Exhibit "A" attached hereto.

Exhibit "A"—(Continued)

writing of literary and/or dramatic material for himself but shall not have the right to accept employment with or engage in the writing or preparation of literary or dramatic material for any person, firm or corporation other than the producer. It is expressly understood that nothing contained in this paragraph shall obligate the employee to request any leave of absence whatsoever [26] nor shall anything in this paragraph be construed so as to obligate the producer to grant the author any leave of absence requested by him. The employee agrees that promptly upon the completion of any and all literary and/or dramatic material written by him, as aforesaid, during any such leave of absence, he will submit the same to the producer. The producer shall have the right, to be exercised by notice in writing to be served upon the employee at any time within thirty (30) days after such submittal, to purchase, for a price to be agreed upon between the employee and the producer, all rights of every kind in and to such material, including specifically, but not limiting the same to, the sole and exclusive motion picture, sound, radio, television and spoken stage rights therein throughout the world, or such of said rights therein as the producer may elect to acquire. If the producer does not elect to purchase such rights, or any of them, within said period of thirty (30) days, or if a price cannot be agreed upon between the employee and the producer, the employee shall have the right to negotiate for the sale of such rights, or any of them, to others than the producer; provided, however, that such rights shall not, nor shall any of them, be sold,

Exhibit "A"—(Continued)

licensed or conveyed to anyone other than the producer unless and until, in each instance, the producer shall have been given an opportunity and shall have failed to avail itself thereof within forty-eight (48) hours (excluding Sundays and holidays) after such opportunity is presented to the producer in writing to purchase the rights so proposed to be sold, licensed or conveyed, for a price at least as favorable as that contained [27] in the offer which the employee contemplates accepting from such other person. Any such offer, in order to foreclose the rights of the producer, as above provided, must of course be bona fide. With respect to any and all material and rights purchased by the producer pursuant to the foregoing provisions of this paragraph, the employee agrees to execute and deliver to the producer such assignment or assignments of such material and/or rights and such other instruments as in the sole judgment and discretion of the producer may be deemed necessary or expedient for the transfer to the producer of the material and/or rights so purchased; it being expressly agreed that all material and/or rights so purchased by the producer shall vest in and inure to the benefit of the producer forthwith upon the purchase thereof by the producer whether or not such assignments and/or other instruments be executed by the employee or delivered to the producer, and the employee shall be deemed to have made the same warranties and representations to the producer with respect to the originality and authorship of such material and the employee's ownership thereof as are set forth in Exhibit "A" attached hereto.

Exhibit "A"—(Continued)

22. The original term hereof and each optional period of employment for which an option is exercised under the provisions of paragraph 18 hereof shall be deemed to consist of separate, consecutive yearly periods equivalent in number to the number of years in the term concerned, each of which yearly periods is herein referred to as a "year of the term". In the event of the occurrence of any contingency or leave of absence during any year of the term by reason of which the producer is entitled under any of the provisions of this agreement to suspend or withhold payment of compensation to the employee and to extend the [28] respective term of this agreement for a period equal to all or any part of the period of such suspension or withholding of compensation, the producer shall also have the right to extend the year of the term in which such leave of absence or contingency occurs, for a period equal to all or any part of the period of the continuance thereof, which right of extension may be exercised by the producer at any time prior to the expiration of such year of the term. The period referred to as a "year of the term" shall be deemed to include all such extensions of the respective year. The right to extend a year of the term shall be in addition to and not in lieu or limitation of any other rights which the producer may have under the provisions of this agreement or otherwise; it being expressly understood, without limiting the foregoing, that the exercise by the producer of the right to extend any year of the term shall not prejudice or impair the producer's right at the same time or at any time there-

Exhibit "A"—(Continued)

after for the same or any other cause to exercise the right elsewhere herein granted to the producer to extend the term of this agreement, nor shall the failure of the producer to exercise the right to extend any year of the term prejudice or impair the producer's right, for the same or any other cause, to exercise the right elsewhere herein granted to the producer to extend the term of this agreement at any time prior to the expiration of said term, nor shall the exercise of such right of extension of a year of the term operate as an extension of or obligate the producer to extend the respective term of this agreement. In the event that any year of the term be extended, as aforesaid, the commencement of the subsequent year or years of the term, if any, shall be postponed [29] for an equivalent period of time, it being agreed that the subsequent year of the term, if any, shall not begin until the expiration of all extensions, if any, of the next preceding year of the term. In the event that any year of the term be extended, as aforesaid, and if the respective term of this agreement is not extended for an equivalent period or periods, then the year of the term which is current at the expiration of the term of this agreement shall, of course, end at the same time as the term, and the remainder of such year of the term and any unexpired balance of the minimum period for which compensation is payable by the producer in respect of such year and any subsequent year or years of the term shall be deemed to be cancelled and eliminated.

23. If the compensation provided by this contract

Exhibit "A"—(Continued)

shall exceed the amount permitted by any present or future law or governmental order or regulation, such stated compensation shall be reduced while such limitation is in effect to the amount which is so permitted; and the payment of such reduced compensation shall be deemed to constitute full performance by the producer of its obligations hereunder with respect to compensation for such period.

24. The employee hereby agrees that the producer may, as his employer, deduct and withhold from the compensation payable to the employee hereunder the amounts required to be deducted and withheld by the producer as the employer of the employee under the provisions of any statute, law, regulation or ordinance heretofore or hereafter enacted [30] requiring the withholding or deducting of compensation.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

LOEW'S INCORPORATED,

By LOUIS K. SIDNEY,
Asst. Treasurer.

/s/ LESTER COLE. [31]

EXHIBIT "B"

Loew's Incorporated

Metro-Goldwyn-Mayer Pictures

Culver City, California

August 21, 1947

Mr. Lester Cole

c/o Metro-Goldwyn-Mayer Studios

Culver City, California

Dear Mr. Cole:

This will constitute the following agreement between us with reference to your contract of employment with us dated December 5, 1945, as amended:

1. We elect to and do hereby exercise the option granted us under the terms of subdivision (a) of paragraph 18 of the aforesaid contract of employment. The term of your employment is, therefore, extended for an additional period of two (2) years from and after the expiration of the present term of said contract of employment upon the same terms and conditions as contained in said contract of employment, except that compensation will be paid to you during said extended period at the rate of One Thousand Three Hundred Fifty Dollars (\$1,350.00) per week, and except as hereinafter specifically provided:

2. We do hereby warrant and agree that during the term of employment provided for in subdivision (a) of paragraph 18 of said contract of employment we will not apply layoff. You will accordingly be compensated each week of each year of said extended

Exhibit "B"—(Continued)

period at the rate hereinabove provided for, [32] subject, however, to all other terms, conditions, rights and remedies of said contract of employment.

3. On condition that you shall fully and completely keep and perform each and all of the obligations and agreements on your part to be kept and performed under the terms and conditions of said contract of employment, during each year of said extended period hereinabove mentioned, you shall be entitled to a vacation of six (6) consecutive weeks with pay during each year of said extended period; each such vacation with pay being hereinafter referred to as the "paid vacation". Each such paid vacation shall commence at such time during each year of said extended period as may be designated by us, on not less than one (1) week's notice to be given by us to you; it being understood that the designation by us of the date for the commencement of either such paid vacation shall not preclude us from thereafter changing such date of commencement and designating an earlier or later date for the commencement of each such paid vacation. It is further understood and agreed that, if on the date designated by us for the commencement of each such paid vacation you are engaged in rendering your services in connection with any assignment, which, in our opinion, is not then completed, the commencement of such paid vacation may, at our option, be postponed until the completion of all services which we may require of you in connection with such photoplay.

Exhibit "B"—(Continued)

4. It is further understood and agreed that, during each year of said extended period, [33] if you so elect, you shall be entitled to an additional vacation, without pay, for a period of time which shall not, in any event, except as hereinafter specifically set forth, exceed six (6) consecutive weeks (said additional vacation being hereinafter referred to as the "unpaid vacation"), providing you notify us to that effect, in writing, not later than two (2) weeks prior to the date that you are desirous of commencing such unpaid vacation. Such written notice shall specify the date of commencement and the desired duration of such unpaid vacation. Said unpaid vacation shall commence at such time during each year of the extended period hereinabove mentioned as may be designated by you, as aforesaid; it being agreed, however, that the designation by you of a date for the commencement of any such unpaid vacation shall not preclude us from thereafter changing such date of commencement and designating a later date for the commencement of such unpaid vacation, in the event you are engaged in rendering services in connection with any uncompleted assignment or assignments upon the date designated by you for the commencement of such unpaid vacation; in which event, said unpaid vacation shall commence upon the day following the completion of all of the services which we may require of you in connection with any such assignment or assignments. It is specifically understood and agreed that, with respect to the first year of the extended period hereinabove mentioned, the

Exhibit "B"—(Continued)

unpaid vacation may be consecutive with, and contiguous to, in point of time, the paid vacation, provided you advise us, in writing, to that effect not later than one (1) week after we shall have designated [34] a date for the commencement of the paid vacation during said first year, but with respect to the second year of the extended period hereinabove mentioned, the unpaid vacation shall not, without our consent, be consecutive with or contiguous to, in point of time, the paid vacation to which you are entitled during the second year of the extended period above mentioned. With reference only to the first year of said extended period, provided that said paid and unpaid vacations applicable to the first year of said extended period, shall not be consecutive, or contiguous to or with each other, in point of time, and further provided that, after having commenced said unpaid vacation applicable to the first year of said extended period, it is apparent that said unpaid vacation will terminate at some time between June 18, 1948, and September 20, 1948, you shall have the right and/or privilege, to extend said unpaid vacation for a period of time not in excess of three (3) weeks, and, in any event, not beyond September 20, 1948, upon condition, however, that you will notify us in writing to that effect, not later than the end of the first week of said unpaid vacation and you will include in said notice the date that you are desirous of terminating said unpaid vacation, as extended, which, of course, shall be subject to the limitations on the extension thereof as hereinbefore specifically

Exhibit "B"—(Continued)

provided for in this sentence. In the event you elect to and do take any unpaid vacation, as aforesaid, such unpaid vacation shall be treated as a leave of absence granted to you by us and all provisions pertaining to leaves of absence contained in your aforesaid contract of employment with us shall apply to any such unpaid vacation [35] or vacations. Without limiting the generality of the next preceding sentence, it is expressly agreed that such unpaid vacation or vacations shall be treated as a leave or leaves of absence within the meaning of paragraphs 11, 12 and 22 of your aforesaid contract of employment with us, and we shall have the right, at our option, to extend the term of your aforementioned contract of employment and, as well, the year of the term which is current at the time any such unpaid vacation is taken by you, and to postpone the commencement of the next year of the term for a period of time equivalent to all or any part of any unpaid vacation granted to you pursuant hereto. It is also understood and agreed that during any vacation period hereunder, whether "paid" or "unpaid", you shall not have the right to render services to or for yourself or to or for any person, firm or corporation other than us.

Except as hereinabove expressly provided, said contract of employment dated December 5, 1945, as amended, is not further changed, altered, amended or affected in any manner or particular whatsoever.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your ap-

Exhibit "B"—(Continued)

unpaid vacation may be consecutive with, and contiguous to, in point of time, the paid vacation, provided you advise us, in writing, to that effect not later than one (1) week after we shall have designated [34] a date for the commencement of the paid vacation during said first year, but with respect to the second year of the extended period hereinabove mentioned, the unpaid vacation shall not, without our consent, be consecutive with or contiguous to, in point of time, the paid vacation to which you are entitled during the second year of the extended period above mentioned. With reference only to the first year of said extended period, provided that said paid and unpaid vacations applicable to the first year of said extended period, shall not be consecutive, or contiguous to or with each other, in point of time, and further provided that, after having commenced said unpaid vacation applicable to the first year of said extended period, it is apparent that said unpaid vacation will terminate at some time between June 18, 1948, and September 20, 1948, you shall have the right and/or privilege, to extend said unpaid vacation for a period of time not in excess of three (3) weeks, and, in any event, not beyond September 20, 1948, upon condition, however, that you will notify us in writing to that effect, not later than the end of the first week of said unpaid vacation and you will include in said notice the date that you are desirous of terminating said unpaid vacation, as extended, which, of course, shall be subject to the limitations on the extension thereof as hereinbefore specifically

Exhibit "B"—(Continued)

provided for in this sentence. In the event you elect to and do take any unpaid vacation, as aforesaid, such unpaid vacation shall be treated as a leave of absence granted to you by us and all provisions pertaining to leaves of absence contained in your aforesaid contract of employment with us shall apply to any such unpaid vacation [35] or vacations. Without limiting the generality of the next preceding sentence, it is expressly agreed that such unpaid vacation or vacations shall be treated as a leave or leaves of absence within the meaning of paragraphs 11, 12 and 22 of your aforesaid contract of employment with us, and we shall have the right, at our option, to extend the term of your aforementioned contract of employment and, as well, the year of the term which is current at the time any such unpaid vacation is taken by you, and to postpone the commencement of the next year of the term for a period of time equivalent to all or any part of any unpaid vacation granted to you pursuant hereto. It is also understood and agreed that during any vacation period hereunder, whether "paid" or "unpaid", you shall not have the right to render services to or for yourself or to or for any person, firm or corporation other than us.

Except as hereinabove expressly provided, said contract of employment dated December 5, 1945, as amended, is not further changed, altered, amended or affected in any manner or particular whatsoever.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your ap-

Exhibit "B"—(Continued)

proval and acceptance thereof in the space herein-
below provided.

Very truly yours,

LOEW'S INCORPORATED,
By LOUIS K. SIDNEY,
Asst.-Treasurer.

Approved and Accepted:

/s/ LESTER COLE.

ECdeL:rm 9-18-47. [36]

State of California,
County of Los Angeles—ss.

Lester Cole, being by me first duly sworn, deposes and says: that he is the Plaintiff in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ LESTER COLE.

Subscribed and sworn to before me this 27th day
of December, 1947.

(Seal) CHARLES J. KATZ,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jan. 7, 1948. Earl Lippold,
County Clerk.

[Endorsed]: Filed February 25, 1948. Edmund L.
Smith, Clerk. [37]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 539099

LESTER COLE,

Plaintiff,

vs.

LOEW'S INCORPORATED, a Corporation, et al.,
Defendants.

PETITION FOR REMOVAL TO FEDERAL
COURT

The verified petition of Loew's, Incorporated, a
corporation, respectfully shows:

I.

At the commencement of the within action and at
all times herein mentioned defendant Loew's Incorporated
was and now is a corporation duly organized
and existing under and by virtue of the laws
of the state of Delaware and duly authorized to
transact and transacting business in the state of
California. By reason of said facts said defendant
at all times material herein has been and is now a
citizen of the State of Delaware. Doe One and Doe
Two, the remaining defendants herein, are fictitious
defendants.

II.

At the commencement of the within action and at
all times material herein plaintiff was and now is a
citizen of the State of California, residing within
the Southern District of California.

III.

The within cause is one and presents a controversy wholly between citizens of different states, to wit: between plaintiff, a citizen of California, and defendant Loew's Incorporated, a citizen of Delaware.

IV.

The matter in controversy herein, exclusive of interest and costs, exceeds in value the sum of \$3,000, said matter being, among other things, the right of plaintiff to have and recover a sum in excess of \$3,000, on account of compensation under an alleged contract of employment between plaintiff and defendant.

V.

The within cause is one in which the United States District Courts are given original jurisdiction in that it is a cause wholly between citizens of different states in which the matter in controversy exceeds in value the sum of \$3,000, exclusive of interest and costs.

Wherefore, defendant Loew's Incorporated respectfully prays that the within cause be transferred and removed to the United States District Court, Southern District of California, Central Division, and that all further proceedings herein be stayed.

LOEB AND LOEB.

By HERMAN F. SELVIN,

Attorneys for Defendant

Loew's Incorporated.

Affidavit of Service by Mail attached.

State of California,
County of Los Angeles—ss.

Herman F. Selvin being by me first duly sworn, deposes and says: that he is a member of the firm of Loeb and Loeb, attorneys of record for Loew's Incorporated, a corporation, petitioning defendant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Affiant further states that he makes this verification for the reason that the facts herein stated are within his knowledge.

HERMAN F. SELVIN.

Subscribed and sworn to before me this 26th day of January, 1948.

[Seal] MARGARET B. WALKER,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Sept. 23, 1951.

Filed 2:33 p.m. Jan. 26, 1948.

EARL LIPPOLD,
County Clerk.

By D. WIENEKE,
Deputy.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF ACTION
TO FEDERAL COURT

This matter having come on regularly to be heard in Department 35 of the above-entitled court on February 2, 1948, upon the petition of defendant Loew's Incorporated for removal of the within cause to the United States District Court for the Southern District of California, and the matter having been duly considered and good cause therefor appearing,

It Is Ordered that the within cause be transferred and removed to the United States District Court for the Southern District of California, Central Division, and that all further proceedings herein, other than the preparation of a certified record. be stayed.

Dated February 2, 1948.

STANLEY N. BARNES,
Judge.

[Endorsed] : Filed February 2, 1948. Earl Lippold,
County Clerk. [48]

State of California,
County of Los Angeles—ss.

I, Earl Lippold, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Notice of Filing and Hearing Petition for Removal, Petition for Removal, Bond on Removal, Summons with proof of service thereon, Minute Order of February 2, 1948, granting petition for removal, and Order for

Removal to the United States District Court, Southern District of California, Central Division, in the action of Lester Cole vs. Loew's Incorporated, a corporation, et al., to be a full, true and correct copy of all of the original documents on file and/or of record in this office in the above-entitled action to date, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 18th day of February, 1948.

(Seal)

EARL LIPPOLD,
County Clerk and Clerk of the Superior Court of the
State of California in and for the County of Los
Angeles.

[Endorsed]: Filed February 25, 1948. Edmund L.
Smith, Clerk. [49]

In the District Court of the United States for the
Southern District of California, Central Division

No. 8005-Y—Civil

LESTER COLE,

Plaintiff,

vs.

LOEW'S INCORPORATED, a Corporation, et al.,
Defendants.

ANSWER OF LOEW'S INCORPORATED
AND DEMAND FOR JURY TRIAL

Defendant Loew's Incorporated answers the complaint on file herein as follows:

I.

Denies that any defendant other than Loew's Incorporated entered into the agreements referred to in paragraph II of the complaint.

II.

Denies the allegations contained in paragraph III of the complaint except that defendant admits that the parties thereto commenced to perform their respective obligations under said agreements on or about December 5, 1945.

III.

Admits the allegations contained in paragraph IV of the complaint except that defendant denies that any statement of fact in said notice of suspension was or is false or untrue; and further [51] denies that any of the contentions made by plaintiff was or is right or tenable.

IV.

Denies the allegations contained in paragraphs V and VI of the complaint.

Wherefore, defendant prays judgment declaring the rights and duties of the parties to be as claimed by defendant, that plaintiff take nothing herein, that defendant have its costs incurred herein, and for such other and further relief as to the Court may seem proper.

LOEB & LOEB,

By /s/ HERMAN F. SELVIN,
Attorneys for Defendant.

Defendant hereby demands a jury trial of all issues of fact herein triable to a jury.

Dated March 1, 1948.

LOEB & LOEB,

By /s/ HERMAN F. SELVIN,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

(Acknowledgment of Service.)

[Endorsed]: Filed March 2, 1948. [52]

[Title of District Court and Cause.]

APPLICATION AND AFFIDAVIT
RE TRANSFER OF CAUSE

The verified application and affidavit of Loew's Incorporated respectfully shows:

1. The within action arises out of a controversy between plaintiff and defendant with respect to the right of the latter to suspend the employment and compensation of the former under a contract of employment between them. Among the issues of fact and law which it will be necessary to determine in this cause are the following:

(a) Did the plaintiff by his conduct while appearing as a witness before the Committee on Un-American Activities of the House of Representatives of the Congress of the United States bring himself into public scorn and contempt, shock and offend the [56] community, substantially lessen the value of his services to defendant as his employer, and prejudice defendant and the motion picture industry generally?

(b) Did defendant have the right to suspend plaintiff's employment and compensation until such time as he had been purged or acquitted of the charge of contempt of the Congress of the United States and had declared under oath that he was not a communist?

2. The appearance and conduct of plaintiff and other persons employed in the motion picture industry before the said Committee on Un-American Activities, their subsequent indictment for contempt as a result thereof, and the fact of their suspension or discharge from their employment, have all re-

ceived wide publicity in newspapers, periodicals and on the radio throughout the United States.

3. Defendant is informed and believes and therefore alleges that the Honorable Leon R. Yankwich, the District Judge before whom the within action is to be tried and heard, has a personal bias and prejudice against the defendant and in favor of the plaintiff herein.

4. The facts and reasons for the belief that the aforesaid bias and prejudice exist are as follows: Defendant is informed and believes and, therefore, alleges that in the latter part of December, 1947, or the early part of January, 1948, (the exact date being unknown to defendant) and subsequent to the occurrence and publicization of the facts involved in this action, the Honorable Leon R. Yankwich in the course of a discussion about the hearings before said Committee and of the ensuing indictments, suspensions and discharges, said in substance and effect that in his opinion there was no legal justification for the suspension [57] or discharge of any of the persons whose conduct before the Committee resulted in their indictment; that he hoped that none of the cases arising out of such suspensions or discharges came before him but if they did he would have no alternative but to render judgment for the plaintiffs in such actions; and that if he were the attorney for such plaintiffs he could recover judgment in their favor for millions of dollars. Said statements, as defendant is informed and believes and, therefore, alleges, were made during a social evening at the home of Mrs. Helen Melnikoff in Los Angeles, California, in the presence of several other

persons, including Mr. James Ruman, hereinafter referred to.

5. The facts and reasons hereinabove in paragraph 4 set forth were communicated to defendant on March 16, 1948, by Mr. James Ruman of 205 Washington Boulevard, Santa Monica, California, who, as he then further informed defendant and as defendant believes, was personally present at said social evening and heard the statements referred to. Mr. Ruman was at all times herein mentioned and still is an employee of Twentieth Century-Fox Film Corporation, against whom an action similar to this one is also pending before another District Judge. Defendant is further informed by Mr. Ruman and believes, and therefore alleges, that he disclosed the matters hereinabove in paragraph 4 and this paragraph set forth because he believed it his duty so to do in view of his employment by Twentieth Century-Fox Film Corporation and in the motion picture industry generally.

6. Prior to March 16, 1948, defendant had no knowledge or information of the matters hereinabove in paragraphs 4 and 5 referred to, but immediately upon learning of them as aforesaid, referred the matter to Herman F. Selvin, a member of the firm of Loeb and Loeb, attorneys for defendant herein. Defendant is informed by said Selvin and believes and therefore alleges that he then conferred with Mr. Ruman who repeated to him substantially [58] the facts hereinabove in paragraphs 4 and 5 referred to.

7. The within application and affidavit has not been made or filed sooner for the reason that the

information upon which it is based was not received until March 16, 1948, and for the further reason that before acting upon said information defendant's attorneys desired to make further inquiries as to said information.

Wherefore, defendant respectfully prays that the Honorable Leon R. Yankwich proceed no further herein and that the cause be transferred to another District Judge.

LEOW'S INCORPORATED,
By /s/ E. J. MANNIX,
Defendant.

LOEB & LOEB,
By /s/ HERMAN F. SELVIN,
Attorneys for Defendant.

I hereby certify that I am a member of the firm of Loeb and Loeb, attorneys for the defendant herein; that as such I have been in charge of the within cause and have appeared herein on behalf of defendant; and that this affidavit and application is made in good faith.

/s/ HERMAN F. SELVIN.

(Acknowledgment of Service.)

(Duly Verified.)

[Endorsed]: Filed March 22, 1948. [59]

[Title of District Court and Cause.]

OPINION

Appearances: For the Plaintiff: Kenny & Cohn, by Robert W. Kenny, Esq., Morris E. Cohn, Esq., Charles J. Katz, Esq., Gallagher, Margolis, McTernan & Tyre, by Ben Margolis, Esq. For the Defendants: Loeb & Loeb, by Herman F. Selvin, Esq., Milton Rudin, Esq. [65]

Yankwich, District Judge:

I.

THE BIAS AND PREJUDICE WHICH DISQUALIFIES

A. How the Question Arises:

On January 7, 1948, the plaintiff, Lester Cole, filed in the Superior Court of the State of California, for Los Angeles County, an action for declaratory and general equitable relief (California Code of Civil Procedure, Secs. 1060-1061). On January 26, 1948, Loew's Inc., the defendant, filed a petition to remove the cause to the United States District Court for the Southern District of California, under the diversity statutes. (28 U.S.C.A., Sec. 41(1)(b), 28 U.S.C.A. Sec. 71).

These are the familiar sections which permit civil actions in which the matter in controversy exceeds three thousand dollars, and which is between the citizens of different States to be removed to the Federal Court, when the defendant is of different citizenship than the plaintiff. Corporations organized in one State and doing business in another, when

sued by citizens of the State where their business is located, are thus enabled to have their causes tried in the Federal instead of the State Courts.

The defendant, being a Delaware corporation, was entitled to have the cause removed.

An Order of Removal was made on February 2, 1948. The delay which usually accompanies the transmittal of the record to the District Court resulted in the cause not being [66] filed in our court until February 28, 1948. When so filed, under the rotation system which obtains in assigning cases (Local Rule 2), the matter was first assigned to Judge Mathes and then to me. I have made no inquiry as to why the change was made. There are certain rules under which, when several cases of similar character are filed, the court which has the case of the lowest number may get more than one of these cases. Judges are not informed of the filings until copies of the pleadings begin to reach them. And I did not know of the filing of this action until a Motion for Judgment on the Pleadings, made by the plaintiff, with supporting memoranda, reached me on March 6, 1948. This Motion I heard on March 15, 1948. Notwithstanding reports to the contrary, which erroneously have crept into some of the press and radio, the matter is undecided.

It is true that during the course of the lengthy legal argument, as is the custom of most judges, certain colloquies occurred between the Court and counsel for both sides. They do not necessarily indicate what the decision will be. Often a Judge resorts to the Socratic method to ask questions to clarify the issues and lawyers of experience know

that in this and every other court, they cannot claim a *vested interest* in any intimations given by the court as to its views on any phase of the matter. I have repeatedly warned younger lawyers of the disappointment which lies ahead if they overlook this. Matters of this importance are seldom decided from the Bench. They require further study. And, in many instances, lawyers are [67] pleasantly surprised that the Judge, *on further study*, has ruled the other way. This is the technic in all American Courts, including the Supreme Court of the United States. Lawyers are familiar with this phenomenon which is an accepted part of the American judicial technic, but lay persons are often baffled by it.

I refer to it in this case because of the intimation in some public channels of communication that, during the argument, I expressed definite views as to what my decision on some of the points of law involved might be. Actually, the entire controversy before me is very narrow. By the Complaint, the plaintiff, is a writer with long experience in writing for motion pictures, seeks a declaration of his rights under his contract of employment with the defendant, dated December 5, 1945. The Defendants, engaged in the production of motion pictures, exercising a right claimed under the contract, suspended the Plaintiff on December 3, 1947, and stopped the payment of his salary, claiming that his conduct before the hearing of a Committee of the House of Representatives in refusing to answer certain questions violated his obligations under the contract of employment. Asserting that the statements are not true, the plaintiff, in his Complaint, claims that the

defendants had no right to suspend him and stop the payment of his salary. He seeks the Court to declare so and that he is entitled to compensation. He also seeks to restrain them from further performing of the notice. [68]

I an Answer filed March 2, 1948, the Defendants admit the execution of the contract and the sending of the Notice, but deny the other matters. They assert their right to suspend. *They have also demanded a trial by Jury.*

In this state of the pleadings, the Plaintiff made a motion for judgment on the pleadings upon the ground that the defenses raised by the Answer are not legally sufficient to raise an issue of fact and that, for this reason, the Court should forthwith render judgment in his favor as prayed for.

It is to be noted from this brief summary of the pleadings that the question before me is not the constitutional validity of the House Un-American Activities Committee, commonly known by the name of its Chairman, The Thomas Committee, or its right to pursue its inquiries. For that matter, I have no doubt of its constitutional validity. Furthermore, I believe, and have expressed the view repeatedly, that the right of congressional inquiry is a great adjunct of the democratic process and that fruitful legislation has resulted from the inquiries of committees in the past, such as the Pujo, the Black and the LaFollette Committees. Nor, for that matter, is there before me the question of the right to ask the questions which were propounded to the witness before the Committee. The narrow question involved in this lawsuit which, because of diversity of citizenship, is governed by

state law, (see, *Angel v. Bullington*, 1947, 330 U.S. 183, 191; *Barrett v. Denver Tramway Corporation*, 1944, 3 [69] Cir., 146 F(2) 701), is whether the Plaintiff's conduct before the Committee was such as to warrant his suspension and the stoppage of his salary by the Defendants.

In the motion for judgment on the pleadings, the sole question involved is whether, under the pleadings, there are issues left which call for a trial. *This issue I did not decide at the hearing. It is still undecided.*

Following the argument, on March 22, 1948, there was filed an application and affidavit to transfer the cause. It was based on an allegation that I have a personal bias and prejudice against the Defendants and in favor of the Plaintiff. The sole basis for this conclusions is the following statement appearing therein:

“Defendant is informed and believes and, therefore, alleges that in the latter part of December, 1947, or the early part of January, 1948, (the exact date being unknown to defendant) and subsequent to the occurrence and publicization of the facts involved in this action, the Honorable Leon R. Yankwich, in the course of a discussion about the hearings before said Committee and of the ensuing indictments, suspensions and discharges, said in substance and effect that in his opinion there was no legal justification for the suspension or discharge of any of the persons whose conduct before the Committee resulted in their indictment; that he hoped that none of the cases arising [70] out of such suspensions or discharges came before him but if they did, he would have no

alternative but to render judgment for the plaintiff in such actions; and that if he were the attorney for such plaintiffs, he could recover judgment in their favor for millions of dollars. Said statements, as defendant is informed and believes, and, therefore, alleges, were made during a social evening at the home of Mrs. Helen Melinkoff in Los Angeles, California, in the presence of several other persons including Mr. James Ruman, hereinafter referred to."

B. The Federal Law of Disqualification.

The affidavit was filed under Section 21 of the Judicial Code (28 U.S.C.A. 25) which provides, among other things:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein * * *. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists." [71]

The section is one-sided—a typical "shot-gun" section. It is intended to cover extreme situations. It does not, as do State statutes, provide for counter-affidavits by the judge and another judge to determine disqualification. (California Civil Code of Procedure, Section 170). For this reason, and the opportunity of abusing the privilege it confers, ever since the enactment of the Statute in 1912, the Courts have sought to protect federal trial judges against the unilateralness of the procedure by limiting its scope strictly, and construing it literally and nar-

rowly. (See, *Scott v. Beams*, 1941, 10 Cir., 122 F(2) 777, 787-788; *Skirvin v. Mesta*, 1944, 10 Cir., 141F.(2) 668, 672.) The first and most important limitation came when the courts held that the bias and prejudice which disqualifies a judge is not some nebulous belief that he may have some preconceived ideas about a piece of litigation, but it meant *personal* bias and prejudice or a bent or leaning against a litigant or in favor of another which, regardless of the merits of a cause, would make it impossible for him to judge the case dispassionately.

In an early case on the subject, the Supreme Court said:

“The basis of the disqualification is that ‘personal bias or prejudice’ exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision [72] obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, *but facts and reasons which tend to show personal bias or prejudice*. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.” (*Italics added.*)

In *Wilkes v. United States*, 1935, 9 Cir., 80 F(2)

285, which arose in this District, it was sought to disqualify the late Judge George Cosgrave, because of allegations that he was biased or prejudiced in a criminal case because in a civil case involving the same matters, he had made adverse rulings to the particular litigant. The Court followed the same criterion promulgated by the Supreme Court in the case just cited and said: [73]

“To satisfy the requirements of Section 21, the facts stated in the affidavit ‘must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.’ *Berger v. United States*, 255 U.S. 22, 23, 41 S.Ct. 230, 233, 65 L.Ed. 481. The affidavit must ‘assert facts from which a sane and reasonable mind may fairly infer bias or prejudice.’ *Keown v. Hughes*, (C.C.A.), 265 Fed. 672, 577. These facts ‘should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading.’ *Morse v. Lewis*, (C.C.A.), 54 F(2) 1027, 1032.

“The affidavit in this case states that the affiant believes that Judge Cosgrave has a personal bias and prejudice against the defendants and in favor of the government, by reason of which the defendants cannot have a fair and impartial trial before him. As reasons for this belief, the affidavit states that civil actions relating to some of the matters involved in this criminal case were brought against some of the defendants in the criminal case in the same court where the criminal case is pending; [74] that in these civil cases there were allegations charging the

defendants with having committed certain wrongful acts; and that the court in the civil cases made certain rulings adverse to the defendants, some of which rulings were made by Judge Cosgrave. These matters cannot be said to disclose personal bias or prejudice within the meaning of Section 21 of the Judicial Code. *Sacramento Suburban Fruit Lands Co. v. Tatham*, (C.C.A.), 40 F(2) 894. See also, *Berger v. United States*, *supra*, 255 U.S. 22, page 31, 41 S.Ct. 230, 65 L.Ed. 481; *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43, 33 S.Ct. 1007, 57 L.Ed. 1379."

Many cases decided since have declared the same ruling. (See, *Ryan v. United States*, 1938, 8 Cir., 99 F(2) 864, 871; *Walker v. United States*, 1940, 5 Cir., 117 F(2) 458, 462; *Beland v. United States*, 1941, 5 Cir., 117 F(2) 958, 960; *Scott v. Beams*, 1941, 10 Cir., 122 F(2) 777, 788-789; *Refior v. Lansing Drop Forge Co.*, 1942, 6 Cir., 124 F(2) 440; *Price v. Johnson*, 1942, 9 Cir., 125 F(2) 806, 811; *Beecher v. Federal Land Bank of Spokane*, 1945, 9 Cir., 153 F(2) 987.)

In *Price v. Johnson*, 1942, 9 Cir., 125 F(2) 806, 811, our own Circuit Court of Appeals again emphasized the fact that the bias or prejudice is not the possession of definite views on the law or even a "prejudgment" of the controversy, but a [75] personal attitude of enmity directed against the suitor making the application. The Court used this language:

"The allegations of appellant's petition for the writ of habeas corpus indicate that the affidavit of bias and prejudice was insufficient under the statute

and, hence, was properly overruled. The statute requires that the bias or prejudice be '*personal*'. The allegations of the affidavit, as disclosed by the petition for the writ, do not indicate a '*personal*' prejudicial or bias against the *accused*, but charge an impersonal prejudice and go to the judge's background and associations rather than his appraisal of the defendant personally. This is not enough under the statute, and the affidavit must be here held to have been insufficient under the law. The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against suitor making the affidavit or in favor of his [76] opponent.' Appellant's allegations reveal that 'the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a pre-judgment of the merits of the controversy. * * * ' (Italics added.)

So the rulings in these cases may be summed up in this manner:

1. The mere filing of an affidavit *does not oust* the judge from the matter.
2. The judge has the right to determine the legal sufficiency of the affidavit.
3. The bias or prejudice must be personal, i.e., antagonism or opposition to the litigant, or favoritism for his opponent.

4. Definite views on the law, adverse rulings in the case on trial, or adverse rulings in other cases or in cases involving similar facts do not constitute such disqualification, *even in a criminal prosecution*.

The sound reason behind the rules which these cases lay down is evident. If a judge were not permitted to have definite views of the law, the community might be deprived of the benefit of his accumulated knowledge. Counsel for these very litigants have appeared before me repeatedly for various motion [77] picture companies in cases involving plagiarism. Because of long experience in the field and of my long preoccupation with literary problems, the trial of these cases has saved time and money to our Government which maintains our courts and to the litigants. Yet none of their opponents have sought to object because in written opinions over a long period of years, I have expressed definite views on the law of copyright and plagiarism or that my knowledge of literature had enabled me to seize quickly similarity and dissimilarity between works of literature. (See, *Carew v. R.K.O. Pictures*, 1942, D.C. Cal., 43 Fed. Sup. 199; *Cain v. Universal Pictures Co.*, 1942, D.C. Cal., 47 Fed. Sup. 1012.) It is also evident why a judge should not be denied the right to try a lawsuit because he may have, in another proceeding, ruled against a litigant, involving a similar or different set of facts. For, if that were not the case, the determination of one lawsuit would permit the losing litigant to bar forever the judge from entertaining litigation by the same litigants. Because of the large number of districts or divisions in which there is only one or two judges, one can

readily envision the dislocation which would occur in the federal judicial system if the law were otherwise.

If you apply these tests to the affidavit filed in this case, *and assuming, as I must, under the law, that it is* [78] *true*, it amounts to nothing more than the expression that there was no legal ground for the discharge of certain persons for refusal to answer questions before a Congressional Committee. A judge expressing such a view at a time when *a cause* is pending in a State court, or even while it is pending in his court, is not legally disqualified from sitting in an action of this character.

To amplify: The Complaint does not seek damages as to which *there might* be discretion, if the case were tried by the Court. *A jury has been demanded by the defendants. It will decide any questions of fact which may arise in the case.* And the only money judgment which could be rendered, in case judgment is for the plaintiff, is for the salary during suspension. The sole matters left to the judge's determination are questions of law, *as to which any preconceived idea does not and could not disqualify.*

Or, to refer to another example: It is well known to the profession that, for many years before I went on the Bench, I specialized in newspaper law. Since going on the Bench, I have published a book on newspaper libel based on such experience, (Yankwich, *Essays on the Law of Libel*, 1929), and many articles in law reviews on this and kindred topics. (Yankwich, *Freedom of the Press in Retrospect and Prospect*, 1942, 15 So. Cal. Law Rev. 322.) If, on seeing an article, I should express the opinion on the basis

of my knowledge of libel law that it is libelous, would that disqualify me from presiding in an action brought on it? Clearly not, if I read these cases aright. [79]

II.

CONSEQUENCES

The conclusion reached calls for amplification in several respects before announcing the actual decision arrived at.

(A) Truth of the Allegations:

As already stated, the truth of the affidavit cannot be adjudicated by the judge involved or anyone else. (*Berger v. United States*, 1920, 255 U.S. 22; *Nations v. United States*, 1926, 8 Cir., 14 Fed. (2) 507.) Nevertheless, it has been the practice in this court and elsewhere for the judge to state his views for the record in some form. I have even seen affidavits by judges, both here and elsewhere.

As the matter involves a statement of my own, I shall file with this opinion affidavits of persons present which clearly support the true version of the discussion which took place at the time and place mentioned in the affidavit. I state for the record that the statement attributed to me was not made by me, in whole, in part or insubstance, either to Mr. James Ruman or in his presence, or to anyone else. Whatever I said that night was said to a group, after dinner, when several persons were discussing various matters, as is the custom on such occasions. As I had never met Mr. Ruman before, I could not possibly have told him anything, in confidence, or outside the hearing of others. As he is not trained in

the law, there was no occasion to discuss legal matters. Furthermore, while there [80] were certain lawyers present, it is not my custom to "talk shop" when out socially. Mr. Ruman, as reported by the affidavit of Mr. E. J. Mannix, is rather "hazy" about the date. He places it "in the latter part of December, 1947, or the early part of January, 1948." *I can supply the exact date.* It was January 24, 1948. The occasion for the gathering was a dinner in honor of Mrs. Yankwich and myself because two days before, January 22, 1948, *we celebrated our twenty-ninth wedding anniversary.* As the dates given in the first part of this opinion show, the present action *was not pending* in our court at that time. It was not filed in our court until February 25, 1948. It did not know of the pendency of the action in the Superior Court. Judges take little interest in cases in trial courts with which they are not connected. The discussion in which I took part was a general discussion about congressional inquiries. Instead of attacking them, I defended them as *necessary instrumentalities of free government.* This, as I have already stated, I believe them to be, despite abuses which serious students of government claim to have crept into their procedure. (See, Walter Gellhorn, Report on a Report of the House Committee on Un-American Activities, 1947, 60 Harvard Law Review, 1193.) The discussion was participated in by several persons. I cannot understand how the statement I made could be interpreted as a "prejudgment" of a controversy not pending [81] before me or be given the construction which Mr. Ruman does.

While a judge is not to engage in public controversies, he is not required by any code of judicial ethics to padlock his civic conscience and deny himself the right of a free man to express his views on civic government matters in the privacy of a friend's home. The defendants and their counsel seem to have been misinformed or deliberately misled by one exhibiting unusual interest in the affairs of others. Perhaps they should have hesitated to act on it, when, *as appears from the affidavit of the Honorable James M. Carter, United States Attorney for this District, they sought but failed to receive confirmation for the alleged conversation communicated to them.* However, I assure them that I harbor no ill feeling towards them because of what was done. Counsel for the defendants gave me an opportunity to avoid the filing of the affidavit. As on a similar occasion in the past, to be referred to presently, I preferred not to do so. I thus followed a precedent of my own, perhaps unknown to them. I also felt that this particular litigant could not claim bias or prejudice on my part because many of their cases have been tried in my court and no complaint was heard from them or their present or other counsel, *regardless of how I decided the matters.*

(B) *The Easy and the Hard Way:*

I realize that in choosing not to avoid the publicity which was bound to follow in a case of this character and in choosing now not to disqualify myself, I take a path which *is not* easy. In my twelve and one-half years on this court only [82] one affidavit of preju-

dice has been filed against me. It was filed in a criminal case. I had tried the defendant on another charge. After his conviction by a jury, I imposed a limit penitentiary sentence, because of the gravity of the offense. When the second case in which similar legal questions might arise was filed, I was requested by the Senior Judge of this court to take over the case. I heard several matters in the case. Then counsel in the case, who had not appeared in the other case, informed me that his client felt that I had bias or prejudice against him. He offered not to file the affidavit if I transferred the case. As in the present case, I insisted that it be filed. Although the affidavit did not state legal grounds for disqualification any more than the affidavit in this case does, I, nevertheless, withdrew rather than delay the proceedings. Quoting the statement of President Wilson that under certain circumstances one should "be too proud to fight", I stated that "I did not choose to make myself the instrumentality of delay". (See, Order, United States v. Canella, No. 17817, dated December 24, 1945.) But the litigant in this case is not a sporadic litigant. It appears often before the federal courts. Some of these cases, taxes, copyright, plagiarism, arise directly under the federal laws. In many instances, as is this case, they remove the cause to the federal courts simply because they are a foreign corporation. In this manner, they are entitled to the advantage of a unanimous jury—if the case is tried by a jury—an advantage which the Conference of Judges of the Ninth Circuit has given [83] on several occasions as one of their reasons for advocating the abolition of jurisdiction of federal courts

based solely upon diversity of citizenship. Even now, the present defendant has at least two actions pending before me. In *Loew's Inc. v. Maurice A. Rapaport et al*, No. 7865, on January 15, 1948, I issued a temporary injunction forbidding the defendant the use of the word "Metro" on phonograph records upon the ground that Metro-Goldwyn-Mayer, the wholly owned subsidiary of the defendant, was known to the public by its shortened name "Metro", and that it being also engaged in the production of records, although under the name "M-G-M", the use of the word "Metro", by the defendant either to designate his records or the business was unfair competition and an infringement of the rights of the plaintiff. On February 11, 1948, I entered a final judgment and issued a permanent injunction *which the defendant now claims put him out of business*. There were pending before me on Monday, March 22, 1948, contempt proceedings arising from an alleged violation of the final injunction. As it is our custom to have another judge, *not so close to the picture*, pass on contempt proceedings arising from a violation of a court order, I requested one of my colleagues to hear the matter. Other proceedings are still possible, which may come before me.

The other case, with different counsel, is *Hendry v. Loew's Inc.*, No. 7744-Y, in which damages on account of personal injuries are asked. As the Complaint stands now, the amount it is sought to recover is \$29,643.00. On February 4, [84] 1948, at a time when I am supposed to entertain "bias and prejudice" against the defendant *Loew's Inc.*, I sustained their motion to dismiss two of the causes of actions

in that case. While the amount involved in them was not large—\$1,500.00—the principles which I declared are important to the defendant, for they relate to their obligations arising from the employment of children on their sets. As the plaintiff in that case accepted my ruling, thus establishing a precedent, the opinion which I wrote acquires added importance, not only to the defendant, but to the entire motion picture industry. The case will come before me for setting on April 5, 1948.

How can a litigant claim that I have bias and prejudice against him in one case and not in another? As the bias and prejudice must be personal, it must, *perforce*, relate to an individual or corporation *as an entirety. It cannot be split into segments.* If I am biased and prejudiced against the defendant and the bias and prejudice is of the character recognized by law—that is, as the Supreme Court said in the Berger case, “*a bent of mind that may prevent or impede impartiality of judgment.*” (Berger v. United States, 1920, 255 U.S. 22, 33.) (Italics added.) I should be disqualified in all their cases. As they have not attempted to disqualify me in any case except this, am I to allow them to tell me which cases they *wish me to try* and which to *transfer out*? I fear that if this were done, there would be established a dangerous precedent, which would allow a litigant to “go shopping” for a judge. With such a precedent [85] to rely on, persons or corporations involved in much litigation before the federal courts *might* attempt to select the judge whom they wish to try a particular case by making unsubstantial charges or try to cow or intimidate judges by threats of making

charges based upon unsubstantiated gossip. I have too much faith in the integrity, courage and independence of my colleagues on this and other federal trial benches to fear that this would succeed. But the very possibility of its being done would breed arrogance in certain litigants, and the independence of the Federal Judiciary would suffer. The meaning of that independence was stated recently by the Honorable Alexander Wiley, United States Senator from Wisconsin, and Chairman of the Judicial Committee of the United States Senate in these words; with which I agree:

“An independent Judiciary is a strong Judiciary, a fearless Judiciary, having respect for its co-equal branches of government, but respecting even more its paramount obligation to the American people in interpreting the supreme law of the land.” (Wiley, *The Meaning of an Independent Judiciary*, 1948, 7 Federal Rules Decisions, 553, 556.)

(C) Standing at My Post:

Of necessity, when a judge declines to disqualify himself, he is, from a purely personal standpoint, placed in a [86] rather uneasy position. No judge can take pleasure in staying in a case where he feels that one of the litigants does not want him. And, ordinarily, the feeling expressed by the Supreme Court applies:

“for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?” (Berger v. United States, 255 U.S. 22, 35.)

This is not only my general feeling, but my par-

ticular feeling in the case. I have no *particular* interest in this case. As I view it, it does not even present the type of legal problem in which a judge would be greatly interested or in which his experience or learning might show to advantage. *It is just another lawsuit.* Nor have I any interest in either litigant. I do not know Mr. Cole, the plaintiff, and I do not know Mr. Mannix, who filed the affidavit. And Loew's Inc., is, to me, just one of the foreign corporations doing business in California who come or are brought into our courts with their problems at various times. So, *the two litigants here are just two litigants*, among thousands whose causes I have adjudicated in my career on the Bench. *If I felt any bias or prejudice against either party, I should withdraw from the case, affidavit or no affidavit.* But, having spent twenty-one and one-half years on the Bench of this community, first as a State judge, [87] appointed by a Governor of California, twice elected by the people of the County, and then as a United States District Judge, nominated by a President of the United States, and confirmed by the Senate of the United States, I feel I owe it to the Court and to the community *not to choose* "the easiest way", which would be to deny disqualification, but transfer the case. There is a much greater duty to stand at one's post than to retreat to "save face". A distinguished District Judge, Merrill Otis, of the Western District of Missouri, confronted with such a situation, wrote:

"Thinking that, I will not voluntarily desert the post at which I have been put. Certainly it will take more to induce me to quit it than affidavits patterned

on that well-known modernization of an ancient epigram:

‘I do not like thee, Dr. Fell,
The reason why I cannot tell.
But this I know, I know full well,
I do not like thee, Dr. Fell.’

I have heard it said that a judge should fade away like a vanishing dream at the moment he discovers some litigant does not like the color of his hair or the pace of his pulse. If, for example, one indicted as a horse thief is about to be tried for practicing his profession without a license and protests that he desires as his judge one who [88] has not been so indiscreet as to suggest he thinks stealing horses of doubtful morality, the judge should say: ‘Why, of course, my dear sir, I yield to your wishes. You shall be the judge as to who shall be your judge. I realize that one prejudiced against horse stealing must be prejudiced against a man charged with stealing horses.’

“Such things have been said, but not by those who think. The father of such a conception of the duty of the judge is the fundamental error that the judge is but a referee at a game, chosen by the players, subject to removal at the will of either. *He is not a referee at a game. He is not the representative of the sovereign and he will abandon the trust reposed in him only at the sovereign’s command or when he falls at his post.*” (United States v. Buck, 1937, D.C. Mo., 18 Fed. Sup. 827, 828-829.) (Italics added.)

Judge Otis has echoed my sentiments. Like him, I must reject an attempt to disqualify which has no legal foundation to support it and which I believe, if

successful, is, for the reasons already indicated, fraught with many dangers for the efficiency and independence of the Federal Judiciary. So doing, I run the risk of having the defendant feel that, consciously or unconsciously, my action might influence me in their case or his opponent think that—as lawyers say—I might “lean backwards.” [89] But I *must* take the risk of speculation on such possibilities. And so I have taken my stand. With God as my witness, I cannot, in good conscience, take another.

Dated this 29th day of March, 1948.

/s/ LEON R. YANKWICH,
United States District Judge.

EXHIBIT No. 1

AFFIDAVIT OF JAMES M. CARTER

State of California,
County of Los Angeles—ss.

James M. Carter, being first duly sworn, deposes and says:

That he was present as the guest of Mr. and Mrs. Albert Mellinkoff at their home in Beverly Hills, California, on Saturday evening, January 24th, 1948; that there was then and there present, Mr. and Mrs. Ruman, Mr. Frank Scully and Judge and Mrs. Leon Yankwich and other persons.

That affiant has been informed of the statement made by Mr. Ruman, purportedly quoting remarks of Judge Leon Yankwich on the occasion described, and in such connection affiant states:

That after dinner a discussion ensued between

Judge Leon Yankwich and Mr. Frank Scully concerning the right of a Congressional Committee to subpoena persons before it and ask questions, and particularly concerning the subpoenaing of the ten personages connected with the motion picture industry.

That Mr. Scully stated, in effect, that the procedure was unconstitutional and dictatorial and would tend to destroy the Democratic process. That Judge Yankwich opposed Mr. Scully vigorously and stated, in substance, that the right of Congressional Committees to subpoena witnesses before them and to ask questions was clearly Constitutional; that if Mr. Scully and people of his frame of mind succeeded in destroying this right of Congress, they would be destroying one of the greatest and most valuable tools of the Democratic process. [91] Judge Yankwich also pointed out the various famous Congressional Committees of the past, including the Black Committee, and the beneficial results which had ensued from the activities of such Committees; that affiant, during the early part of the discussion and argument, participated therein, supported the view as expressed by Judge Yankwich as set forth above and stated that he believed the Committee was right in citing the ten persons named for contempt for their refusal to answer questions, and stated also that there was nothing in the Constitution that guaranteed the right of opinion, and that in the particular inquiry, the questions were not asked as to the witness' opinion but whether the witness had done something further to carry out his opinion, namely the question as to

whether he had joined an organization, and that affiant was of the view the questions were proper and should have been answered.

That thereafter, affiant withdrew from the discussion, but that the discussion continued and the arguments advanced by Frank Scully and Judge Yankwich were again repeated in a vigorous manner, within my hearing and the hearing of others. That Judge Yankwich did not, to affiant's knowledge, talk alone with Mr. Ruman. That at no time did affiant hear Judge Yankwich mention the name of any one of the ten persons who were cited for contempt, nor did he hear Judge Yankwich express any opinion on the matter of the discharge of any one of the said personages from his employment, nor did he hear Judge Yankwich state that he, Judge Yankwich, or any other person could recover damages in any amount, for and on behalf of any one of said personages.

That subsequently, on or about March 18, 1948, Herman Selvin, an attorney with whom affiant is personally acquainted, called affiant on the telephone and asked affiant if he had been present at the social meeting above described, and what he had heard Judge Yankwich state. That affiant stated to Mr. Selvin, in substance, all of the matters hereinabove set forth and Mr. Selvin asked specifically about other alleged remarks concerning matters involving the discharge from their employment, of one or more of the said ten persons above described, and also whether or not Judge Yankwich had made any remarks concerning what damages he, or someone else

could recover from the employers of one or more of said persons by reason of their discharge. [92]

That affiant stated to said Selvin that he had not heard any such remark, and that he did not believe it was made during the discussion above referred to.

/s/ JAMES M. CARTER.

Subscribed and sworn to before me this 25th day of March, 1948.

(Seal) /s/ GEORGE M. BRYANT,

Notary Public in and for said County and State.

EXHIBIT No. 2

State of California,
County of Los Angeles—ss.

Alice Scully, being first duly sworn, deposes and says:

That she was present at a dinner given by Mr. and Mrs. Albert Mellinkoff on January 24th, 1948, and she heard and was present when a certain discussion about the legality of Congressional Committees to investigate and examine witnesses took place between Frank Scully and Judge Leon Yankwich; that she heard said Judge Yankwich strongly and very firmly, almost violently, uphold that Congress has had that right ever since the beginning of our government, and if that right were taken away from Congress then our whole system of government would collapse.

I was present during all of said discussion, and at no time did I hear or were there any prejudicial statements made by said Judge Yankwich such as

those attributed to him by James Ruman and set forth by Edward J. Mannix in his affidavit on file herein.

/s/ ALICE SCULLY.

Subscribed and sworn to before me this 23rd day of March, 1948.

(Seal) /s/ (Illegible),

Notary Public, in and for said County and State.

EXHIBIT No. 3

State of California,
County of Los Angeles—ss.

Albert Mellinkoff, being first duly sworn, deposes and says:

That I live at 811 North Foothill Road, Beverly Hills, California; that on the evening of January 24th, 1948, Judge Leon R. Yankwich was a guest in my home, together with several others including James Ruman.

At all times during the evening I was within hearing of remarks made by Judge Yankwich and at no time during said evening did I hear Judge Yankwich make any such remark attributed to him by James Ruman as reported in the press accounts of the affidavit of Mr. E. J. Mannix.

/s/ ALBERT MELLINKOFF.

Subscribed and sworn to before me this 24th day of March, 1948.

(Seal) /s/ DAVID S. MELLINKOFF,

Notary Public, Los Angeles County. My Commission expires Jan. 28, 1950. [95]

EXHIBIT No. 4

State of California,
County of Los Angeles—ss.

Saoul Lourie, being first duly sworn, deposes and says:

That I live at 316 Adelaide Drive, Santa Monica, California; that on the evening of January 24, 1948, I was a guest in the home of Mr. and Mrs. Albert Mellinkoff at 811 Foothill Road, Beverly Hills, California; that Judge Leon Yankwich was among those present; that Mr. James Ruman was also present;

That during the evening, there was a discussion of the Thomas Committee on Un-American Activities; that Judge Yankwich declared that the Thomas Committee had every right to ask any manner of questions of witnesses, and that this was a power secured under the United States Constitution, and one that had been exercised by Congressional Committees over the years;

That at no time during the course of the evening did I hear Judge Yankwich or anyone else make the remarks attributed to Judge Yankwich by Mr. James Ruman in the affidavit of a Mr. Mannix, as reported in the Los Angeles newspapers.

/s/ SAOUL LOURIE.

Subscribed and sworn to before me this 24th day of March, 1948.

(Seal) /s/ DAVID S. MELLINKOFF,
Notary Public, Los Angeles County. My Commission
expires Jan. 28, 1950. [96]

EXHIBIT No. 5

State of California,
County of Los Angeles—ss.

Helen Mellinkoff, being first duly sworn, deposes and says: On January 24th, 1948, at my home, 811 No. Foothill Road, Beverly Hills, California, we had a dinner party in celebration of the 29th wedding anniversary of Judge and Mrs. Leon R. Yankwich. The guests engaged in various conversations. The subject which seemed to hold the attention of almost all the guests was that pertaining to the actions of the House Un-American Activities Committee. Many questions were directed to Judge Yankwich. In a scholarly manner Judge Yankwich explained the historical background of Congressional Investigations. He cited authorities for his contentions and maintained that the House Un-American Activities Committee by the power vested in it has a right to ask questions pertaining to beliefs, that such a right must never be taken from Congress lest it jeopardize orderly, democratic procedure. At no time during the entire evening did I hear any statement made by Judge Yankwich which could possibly be interpreted as that which is attributed to him in the affidavit by one, E. J. Mannix as reported in the Los Angeles newspapers.

/s/ HELEN MELLINKOFF.

Subscribed and sworn to before me this 24th day of March, 1948.

(Seal)

/s/ A. B. MONK,
Notary Public, Los Angeles County. [97]

EXHIBIT No. 6

State of California,
County of Los Angeles—ss.

David Mellinkoff, being first duly sworn, deposes and states:

That his home address is 2478 Benedict Canyon Drive, Beverly Hills, California; that on the evening of January 24, 1948, affiant was a guest in the home of Mr. and Mrs. Albert Mellinkoff at 811 Foothill Road, Beverly Hills, California; that among other guests present were Judge Leon Yankwich and also one James Ruman;

That during the evening there was discussion of the right of the House Un-American Activities Committee to question witnesses as to their political beliefs; that affiant participated in said discussion; that the said Judge Leon Yankwich vigorously defended the complete freedom of Congressional Committees in conducting investigations to determine the need for and scope of legislation; that the said Judge Yankwich quoted legal precedent for such investigations dating back to the early days of the Republic, and affiant recalls in particular that the said Judge Yankwich mentioned the Pujo and Black investigating committees;

That affiant has read the report in the Los Angeles Herald Express of March 22, 1948, of an affidavit by one Mannix being filed in connection with a lawsuit pending in the court of the said Judge [98] Leon Yankwich, and affiant has read therein an account of alleged remarks made by the said Judge Yankwich on the occasion heretofore mentioned, said remarks

having been allegedly reported by the aforesaid Ruman;

That of his own knowledge, affiant states that said alleged remarks were not made, and that nothing said by the said Judge Yankwich or by anyone else on the aforesaid occasion could have been reasonably or in any way construed to mean what the said Ruman has reported.

/s/ DAVID MELLINKOFF.

Subscribed and sworn to before me this 24th day of March, 1948.

(Seal) /s/ LEO K. GOLD,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed March 29, 1948. [99]

[Title of District Court and Cause.]

ORDER ON APPLICATION FOR DISQUALIFICATION AND TRANSFER OF CAUSE

The application for disqualification and transfer of cause heretofore filed and submitted, is hereby decided as follows:

Upon the grounds stated in the Opinion filed herewith the Court finds the affidavit filed with the petition and the whole of said petition to be insufficient in law, and orders that the affidavit be and the same

is hereby overruled, and the application be and the same is hereby denied.

Dated this 29th day of March, 1948.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed March 29, 1948. [100]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Honorable Leon R. Yankwich, District Judge, on June 28, 1948. Plaintiff was represented by Messrs. Kenny and Cohn, by Mr. Morris E. Cohn, Mr. Charles J. Katz and Messrs. Gallagher, Margolis, McTernan and Tyre by Mr. Ben Margolis, his attorneys, and defendant was represented by Mr. Irving M. Walker, Mr. Herman F. Selvin and Messrs. Loeb and Loeb by Mr. Herman F. Selvin and Mr. Milton A. Rudin, its attorneys.

Based on the proceedings had at said pre-trial hearing,

It Is Ordered: [103]

I.

The following facts are admitted to be true:

(A) Plaintiff is a resident of the county of Los Angeles, state of California.

(B) Defendant Loew's Incorporated is a corporation organized under the laws of Delaware, maintains a principal office and transacts business in the county of Los Angeles, state of California.

(C) The matter in controversy, exclusive of interest and costs, exceeds in value the sum of Three Thousand Dollars (\$3,000).

(D) Plaintiff is by profession a writer, and has had long experience in working in such capacity in the motion picture industry.

(E) Defendant Loew's Incorporated in engaged, among other things, in the business of producing motion pictures.

(F) On or about December 5, 1945, in the county of Los Angeles, state of California, plaintiff and defendant Loew's Incorporated entered into a contract of employment, a copy of which is attached hereto and marked "Plaintiff's Exhibit 1".

(G) Said contract generally was prepared by defendant Loew's Incorporated; and paragraphs 8, 9, 11 and 12 thereof are on a form generally used by said defendant.

(H) Said contract was amended by a letter agreement, dated August 21, 1947, and prepared by Loew's Incorporated; a copy of said amendment is attached hereto and marked "Plaintiff's Exhibit 2".

(I) No defendant other than Loew's Incorporated entered into the agreement referred to herein in paragraphs "F" and "H". [104]

(J) The parties to said agreements commenced to perform their respective obligations under said agreements on or about December 5, 1945.

(K) Plaintiff well and truly performed all writing services required of him until on or about December 2, 1947.

(L) Defendant Loew's Incorporated well and truly performed each and every obligation of said

agreements on its part to be performed until December 2, 1947.

(M) On or about December 2, 1947, defendant Loew's Incorporated delivered to plaintiff a certain written notice, a copy of which is attached hereto and marked "Plaintiff's Exhibit 3". Since the delivery of said notice neither plaintiff nor defendant Loew's Incorporated has rendered any performance under said agreement; but plaintiff has been and is ready and willing to render his said services.

(N) On October 30, 1947, plaintiff Lester Cole appeared as a witness before the Committee on Un-American Activities of the House of Representatives, Eightieth Congress, First Session, at Washington, D. C., pursuant to a subpoena theretofore served upon him compelling him to appear before said Committee. Lester Cole was sworn and then and there testified as follows:

"Mr. Stripling: Mr. Cole, will you please state your full name and present address?

Mr. Cole: Lester Cole, 15 Courtney Avenue, Hollywood, Calif.

Mr. Stripling: When and where were you born, Mr. Cole?

Mr. Cole: I was born June 19, 1904, in New York City. [105]

Mr. Stripling: What is your occupation?

Mr. Cole: I am a writer.

Mr. Stripling: How long have you been a writer?

Mr. Cole: For approximately 15, 16 years.

Mr. Stripling: How long have you been in Hollywood?

Mr. Cole: Since—I first came to Hollywood in

1926; I left and went back to New York in 1929; returned in 1932, and have been there ever since.

Mr. Stripling: Are you a member of the Screen Writers' Guild?

Mr. Cole: Mr. Chairman, I would like at this time to make a statement (handing statement to the chairman).

Mr. McDowell: I think it is insulting, myself.

The Chairman: This statement is clearly another case of villification and not pertinent at all to the inquiry. Therefore, you will not read the statement.

Mr. Cole: Well, Mr. Chairman—

The Chairman: Mr. Stripling, ask the first question.

Mr. Cole: Mr. Chairman, may I just ask if I do not read my statement . . .

The Chairman: You will not ask anything.

Mr. Cole: Is the New York Times editorial pertinent—the editorial in the Herald Tribune pertinent?

The Chairman: Go ahead and ask the question.

Mr. Stripling: Mr. Cole, are you a member of the Screen Writers' Guild?

Mr. Cole: I would like to answer that question and would be very happy to. I believe the reason the question is asked is to help enlighten—

The Chairman: No, no, no, no, no.

Mr. Cole: I hear you, Mr. Chairman, I hear you, I am sorry, but— [106]

The Chairman: You will hear some more.

Mr. Cole: I am trying to make these statements pertinent.

The Chairman: Answer the question, 'Yes' or 'No'.

Mr. Cole: I am sorry, sir, but I have to answer the question in my own way.

The Chairman: It is a very simple question.

Mr. Cole: What I have to say is a very simple answer.

The Chairman: Yes, but answer it 'Yes' or 'No'.

Mr. Cole: It isn't necessarily that simple.

The Chairman: If you answer it 'Yes' or 'No', then you can make some explanation.

Mr. Cole: Well, Mr. Chairman, I really must answer it in my own way.

The Chairman: You decline to answer the question?

Mr. Cole: Not at all, not at all.

The Chairman: Did you ask the witness if he was here under subpoena?

Mr. Cole: What is it, Mr. Chairman? I beg your pardon?

Mr. Stripling: Mr. Cole, you are here under subpoena served upon you on September 19, are you not?

Mr. Cole: Yes, I am.

Mr. Stripling: And the question before you is: Are you a member of the Screen Writers' Guild?

Mr. Cole: I understand the question, and I think I know how I can answer it to the satisfaction of the committee. I wish I would be permitted to do so.

The Chairman: Can't you answer the question?

Mr. Cole: You wouldn't permit me to read my statement and the question is answered in my statement.

The Chairman: Are you able to answer the ques-

tion 'Yes' or 'No' or are you unable to answer it 'Yes' or 'No'? [107]

Mr. Cole: I am not able to answer 'Yes' or 'No'. I am able, and I would like to answer it in my own way. Haven't I the right accorded to me, as it was to Mr. McGuinness and other people who came here?

The Chairman: First, we want you to answer 'Yes' or 'No', then you can make some explanation of your answer.

Mr. Cole: I understand what you want, sir. I wish you would understand that I feel I must make an answer in my own way, because what I have to say—

The Chairman: Then you decline to answer the question?

Mr. Cole: No, I do not decline to answer the question. On the contrary, I would like very much to answer it; just give me a chance.

The Chairman: Supposing we gave you a chance to make an explanation, how long would it take you to make that explanation?

Mr. Cole: Oh, I would say anywhere from a minute to 20, I don't know.

The Chairman: Twenty?

Mr. Cole: Sure, I don't know.

The Chairman: And would it all have to do with the question?

Mr. Cole: It certainly would.

The Chairman: Then would you finally answer it 'Yes' or 'No'?

Mr. Cole: Well, I really don't think that is the question before us now, is it?

The Chairman: Then go to the next question.

Mr. Stripling: Mr. Cole, are you now or have you ever been a member of the Communist Party?

Mr. Cole: I would like to answer that question as well; I would be very happy to. I believe the reason the question [108] is being asked is that because at the present time there is an election in the Screen Writers' Guild in Hollywood that for 15 years Mr. McGuinness and others—

The Chairman: I didn't even know there was an election out there. Go ahead and answer the question. Are you a member of the Communist Party?

Mr. Cole: If you don't know there is an election there you didn't hear Mr. Lavery's testimony yesterday.

The Chairman: There were some parts I didn't hear.

Mr. Cole: I am sorry, but I would like to put it into the record that there is an election there.

The Chairman: All right, there is an election there. Now, answer the question, are you a member of the Communist Party?

Mr. Cole: Can I answer that in my own way, please? May I, please? Can I have the right? Mr. McGuinness was allowed to answer in his own way.

The Chairman: You are an American, aren't you?

Mr. Cole: Yes; I certainly am, and it states so in my statement.

The Chairman: Then you ought to be very proud to answer the question.

Mr. Cole: I am very proud to answer the question, and I will at times when I feel it is proper.

The Chairman: It would be very simple to answer.

Mr. Cole: It is very simple to answer the question—

The Chairman: You bet.

Mr. Cole (Continuing): And at times when I feel it is proper I will, but I wish to stand on my rights of association—

The Chairman: We will determine whether it is proper.

Mr. Cole: No, sir. I feel I must determine it as well. [109]

The Chairman: We will determine whether it is proper. You are excused.”

II.

The following issues of fact remain for determination:

(A) What were plaintiff's acts, conduct and activities, severally and/or in association or concert with others, in respect of the matters referred to in the notice marked “Plaintiff's Exhibit 3”?

(B) Did plaintiff by his conduct and activities during and in connection with his said appearance as a witness before the Committee on Un-American Activities shock and offend the community, bring himself into public scorn and contempt, substantially lessen his value as an employee to defendant Loew's Incorporated, prejudice the interests of said employer and/or the motion picture industry generally, and render himself unable to render the kind and quality of services required and contemplated by the contract of employment and/or the employment relationship created thereby?

(C) Did plaintiff by his said conduct and activities injure or prejudice the interests of defendant Loew's

Incorporated, or bring about the likelihood or danger of any such injury or prejudice?

(D) Did the act of defendant Loew's Incorporated in delivering and putting into effect the notice marked "Plaintiff's Exhibit 3" cause irreparable injury to plaintiff?

III.

The parties hereto will serve and file trial memoranda as required by Local Rule 12, except, however, that it will not be necessary to include therein any admissions and stipulations [110] contained in this order.

IV.

Nothing in this order contained shall be a determination or finding contrary to plaintiff's contention herein that there are no issues of fact to be tried or that any of the issues of fact heretofore in paragraph II set out is in reality an issue of law.

Dated November 22, 1948.

/s/ LEON R. YANKWICH,
District Judge.

Approved as to form as provided in Local Rule 7:

KENNY & COHN,
CHARLES J. KATZ,
GALLAGHER, MARGOLIS,
McTERNAN & TYRE,

By /s/ (Illegible),
Attorneys for Plaintiff.

IRVING M. WALKER,
HERMAN F. SELVIN,
LOEB & LOEB,

By /s/ HERMAN F. SELVIN,
Attorneys for Defendant. [111]

[A copy of the document here attached as Exhibit No. 1 appears elsewhere herein as Exhibit "A" attached to the Complaint.]

Metro-Goldwyn-Mayer Pictures
Culver City, California

Assignment of All Rights

Know All Men By These Presents:

1. That I, Lester Cole, for a good and valuable consideration to me in hand paid by Loew's Incorporated, a Delaware corporation, the receipt of which is hereby acknowledged, have given, granted, bargained, sold, assigned, transferred and set over and by these presents do give, grant, bargain, sell, assign, transfer and set over, forever, unto said Loew's Incorporated, hereinafter referred to as the "purchaser," that certain story, adaptation, continuity, entitled, hereinafter referred to as the "work," also the title and theme thereof; together with all now or hereafter existing rights of every kind and character whatsoever pertaining to said work, whether or not such rights are now known, recognized or contemplated, and the complete, unconditional and unencumbered title in and to said work for all purposes whatsoever.

2. I further give, grant, bargain, sell, assign, transfer and set over, forever, to the purchaser, the absolute and unqualified right to use said work, in whole or in part, in whatever manner said purchaser may desire, including (but not limited to) the right to make, and/or cause to be made, literary, dramatic, speaking stage, motion picture, photoplay, television,

radio and/or other adaptations of every kind and character, of said work, or any part thereof; and for the purpose of making or causing to be made such adaptations or any of them the purchaser may adapt, arrange, change, novelize, dramatize, make musical versions of, interpolate in, transpose, add to and subtract from said work, and/or the title thereof, to such extent as the purchaser in its sole discretion may desire, and may likewise translate the same into all or any languages. The purchaser shall have the right to use my name as the author of the literary composition upon which said adaptations, or any of them, are based; and shall have the further right to use the title of said work in conjunction with any adaptation of said work, or any part thereof; and/or the purchaser may use in connection with such adaptations, or any of them any other title or titles which it may select, and/or the purchaser shall have the right to use the title of said work in connection with any literary, dramatic, or other works not based upon said work. The purchaser shall also have and is hereby given the right to obtain copyright in all countries upon said work and upon any and all adaptations thereof, including the right of acquiring copyright in all countries upon any motion pictures based in whole or in part upon said work.

3. Without in any manner limiting or derogating from the generality of the rights hereinabove in paragraphs 1 and 2 granted to the purchaser, I hereby particularly give, grant, bargain, sell, assign, transfer, and set over forever to the purchaser the sole and exclusive motion picture rights, talking picture rights, and synchronized picture rights throughout

the world in and to said work, and also in and to the title and theme thereof together with the sole and exclusive right, license, and privilege of using said work and title for motion picture, talking picture, photoplay, and synchronized picture purposes; also the sole and exclusive right to make motion picture films and photoplays based in whole or in part on said work, together with the right to sell, lease, license, and generally deal and traffic in the same and/or recordings and/or reproductions thereof throughout the world at any and all times after the execution hereof. The term "photoplay," as used in this instrument, shall be deemed to include, but not be limited to, motion picture productions produced, transmitted and/or exhibited with sound and voice recording and reproducing devices, radio devices, and all other now existing or future improvements and devices which are now or may hereafter be used in connection with the production, transmission and/or exhibition of motion picture productions. All rights necessary to produce, transmit and/or exhibit such motion picture version or versions of said work, accompanied by such sound and voice recording and reproducing devices, radio devices, and all other now existing or future improvements and devices which are now or may hereafter be used in connection with the production, transmission and/or exhibition of motion picture productions, are hereby transferred and assigned to the purchaser. The purchaser is hereby given the right to use the title of said work in conjunction with motion picture productions and photoplays based upon said work or any part thereof; but the purchaser shall not be obligated so to do and

may use any other title or titles which it may select as the title of such motion picture productions and photoplays; and/or the purchaser shall have the right to use the title of said work in conjunction with motion picture productions and photoplays not based upon said work. The provisions of this paragraph shall not be deemed or construed in any manner to limit or derogate from the generality of the full and complete rights hereinabove in paragraphs 1 and 2 granted to the purchaser.

4. I hereby represent and warrant that I am the sole author and owner of said work, together with the title thereof; that I am the sole owner of all rights of any and all kinds whatsoever in and to said work, throughout the world; that there has been no publication or any other use of said work or any part thereof with my knowledge or consent anywhere in the [136] world; that I have the sole and exclusive right to dispose of each and every right herein granted and/or purported to be granted; that neither said work nor any part thereof is in the public domain; that no motion pictures or any other works have been produced which have been based in whole or in part upon said work; that I have in no way conveyed, granted or hypothecated any rights of any kind or character in or to said work, or any part thereof, to any person whomsoever, other than the purchaser, nor have I granted any right, license or privilege with respect to any of the rights herein granted and/or purported to be granted, to any person other than the purchaser; that I have not done or caused or permitted to be done any act or thing by which any of the rights herein granted and/or purported

to be granted to the purchaser have been in any way impaired; and that I will not at any time execute any further agreement or agreements in conflict herewith, nor will I in any way attempt to encumber the rights herein granted, nor will I do or cause or permit to be done any act or thing by which the rights herein granted and/or purported to be granted to the purchaser may in any way be impaired. I further represent and warrant that said work is original with me in all respects, that no incident therein contained and no part thereof is taken from or based upon any other literary or dramatic work or any photoplay, or in any way infringes upon the copyright or any other right of any individual, firm, person or corporation; and that the reproduction, exhibition or any other use by the purchaser of said work in any form whatsoever will not in any way, directly or indirectly, infringe upon the rights of any individual, firm, person or corporation whatsoever.

5. I hereby appoint the purchaser my true and lawful attorney, irrevocably, but for the sole benefit of the purchaser, to institute and prosecute such proceedings as the purchaser may deem expedient to protect the rights herein granted and/or purported to be granted, and/or to effect the recovery by the purchaser of damages and penalties for the infringement of said rights, and/or to secure to the purchaser the full benefit of all of the rights herein granted and/or purported to be granted. The purchaser may sue in its own name and/or may use my name, and/or at its option may join me as party plaintiff or defendant in any suit or proceeding brought for such purpose or purposes.

6. I hereby guarantee and warrant that I will indemnify, make good and hold harmless the purchaser of, from and against any and all loss, damage, costs, charges, legal fees, recoveries, judgments, penalties and expenses which may be obtained against, imposed upon or suffered by the purchaser by reason of any infringement or violation or alleged violation of any copyright or any other right of any person, firm or corporation, or by reason of or from any use which may be made of said work by the purchaser, or by reason of the breach of any term, covenant, representation, or warranty herein contained, or by reason of anything whatsoever which might prejudice the securing to the purchaser of the full benefit of the rights herein granted and/or purported to be granted. The foregoing guarantees and warranties shall not apply to any changes in said work which may be made by the purchaser.

7. I hereby agree duly to execute, acknowledge and deliver, and/or to procure the due execution, acknowledgement and delivery to the purchaser of any and all further assignments and/or other instruments which in the sole judgment and discretion of the purchaser may be deemed necessary or expedient to carry out or effectuate the purposes or intent of this present instrument.

8. If the names of two or more persons appear hereinabove in paragraph 1 as the "undersigned," or if this instrument be executed by two or more persons, then and in that event this agreement shall be binding jointly and severally upon said persons, and each of them, and each and all of the representations, warranties, agreements, and obligations on the part

of the undersigned, hereinabove set forth, shall be and be deemed to be the joint and several representations, warranties, agreements, and obligations of said persons, and each of them; and the terms "undersigned" and "he" (wherever "he" refers to the undersigned) shall be deemed to include and apply to all persons who are described as the "undersigned"; and wherever the context so requires, the masculine gender shall include and apply to all genders, and the singular shall apply to and include, as well, the plural. The term "purchaser" as used herein shall include the purchaser herein named, and as well, its successors and assigns. The purchaser may assign, transfer and grant all or any part of the rights herein granted it to any individual, firm, person or corporation, without limit, and shall enjoy its rights hereunder in perpetuity and forever, as long as any rights in said work are recognized in law or in equity, except insofar as such period of perpetuity may be shortened due to any copyrighting by the purchaser of said work and/or any adaptation or adaptations thereof, in which case the purchaser shall enjoy its rights hereunder for the full duration of such copyright or copyrights, including any and all renewals thereof.

In Witness Whereof, I have hereunto set my hand this day of, 19

. (Seal).

State of California,
County of Los Angeles—ss.

On this day of, 19, before me,, a notary public in

and for said county and state residing therein, duly commissioned and sworn, personally appeared
, known to me to be the person.. whose name.. (is) (are) subscribed to the foregoing instrument, and acknowledged to me that ..he.. executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

.,
 Notary Public in and for the County of Los Angeles,
 State of California. [137]

EXHIBIT "X"

A. Screen credit for the screen play authorship of a feature-length photoplay will be worded "Screen Play By" or "Screen Play—".

B. Except in unusual cases, screen credit for the screen play will not be shared by more than two (2) writers and in no case will the names of more than three (3) be used, provided, however, that two (2) established writing teams recognized and employed as such and of not more than two (2) members each may share screen credit for screen play. The intention and spirit of the award of credits being to emphasize the prestige and importance of the screen play achievement, the one (1), two (2) or at most three (3) writers, or two (2) teams, chiefly responsible for the completed work will be the only screen writers to receive screen play credit.

C. The only exception to the foregoing shall be:
 (1) Musicals.

(2) Pictures on which one (1) writer (or a team) writes both the original story and screen play. In this case the credit may be worded "By", "Original Story and Screen Play By", or "Original Screen Play By".

D. The term "screen play" means the final script (as represented on the screen) with individual scenes, full dialogue and camera setups, together with such prior treatment, basic adaptation, continuity, scenario, dialogue, added dialogue or gagging as shall be used in and represent substantial contributions to the final script. The term "photoplay" means a feature-length photoplay.

E. No production executive will be entitled to share in the screen play authorship screen credit unless he does the screen play writing entirely without the collaboration of any other writer.

F. When more than one (1) writer has substantially contributed to the screen play authorship of a photoplay, then all such writers will have the right to agree unanimously among themselves as to which one (1) or two (2) or in exceptional cases three (3) of them, or two (2) teams of the nature above mentioned, shall receive credit on the screen for the authorship of the screen play. If at any time during the course of production all such writers so agree, then the Producer will not be obligated to issue the notices specified in Paragraphs J through P of this Exhibit.

G. The Producer shall have the right to determine in which one of the following places the screen play credit shall appear on the screen:

(1) On the main title card of the photoplay.

(2) On a title card on which credits are given only for the screen play.

(3) On a title card on which credits are given for the original story.

(4) On a title card on which credits are given for the sources of the material upon which the screen play was based.

H. A writer whose contribution is judged by the Producer to represent a substantial portion of the completed screen play shall for the purpose of this Exhibit "X" be considered a "substantial contributor". As a substantial contributor he shall be entitled to participate in the procedure for determination of screen credits.

I. The screen credits and also the work of writers making substantial contributions but not receiving screen credit may be publicized by the Producer.

J. Before the screen credits for screen play authorship are finally determined, the Producer will send a written notice to each writer who is a substantial contributor. This notice will state the Producer's choice of screen play credits on a tentative basis, together with the names of the other substantial contributors and their addresses last known to the Producer.

K. The Producer will make reasonable efforts in good faith to communicate with such writers. The notice specified in the foregoing Paragraph will be sent by telegraph to writers outside of the Los Angeles area or by telegram, messenger or special delivery mail to writers in such area. No notice will be

sent to writers outside of the United States or writers who have not filed a forwarding address with the Producer. In case of remakes the Producer shall not be under any obligation to send any notice to any writer contributing to the screen play of the original production unless such writer received screen credit

L. The Producer will keep the final determination of screen play credits open until a time specified in the notice by the Producer, but such time will not be earlier than six o'clock, p.m. of the next business day following dispatch of the notice above specified. If by the time specified a written notice of objection to the tentative credits or written request to read the script has not been delivered to the Producer from any of the writers concerned, the tentative credits will become final.

M. However, if a written protest or written request to read the script is received by the Producer from any writer concerned within the time specified in Paragraph L hereof, the Producer will withhold final determination of screen play credits until a time to be specified by the Producer, which time will be not earlier than forty-eight (48) hours after the expiration time specified for the first notice mentioned in the foregoing Paragraphs.

N. Upon receipt of a written protest or request to read the script the Producer will make at least two (2) copies of the script available for reading at its studio. The Producer will also notify by telegraph the writer or writers tentatively designated by the Producer to receive screen play credit, informing them of the new time set for final determination.

O. If, within the time limit set for final determina-

tion of credits, exclusive of any writer or writers waiving claim to screen credit, all of the writers entitled to notice have unanimously designated to the Producer in writing the names of the one (1) or two (2) or in exceptional cases three (3), writers or two (2) teams to whom screen play credit shall be given, the Producer will accept such designation. If such designation is not so communicated to the Producer by such writers within the time above mentioned, the Producer may make the tentative credits final or change them as the Producer sees fit within the requirements hereof as to wording and limitation of names. [138]

P. Any notice specified in the foregoing Paragraphs, unless a specified form of service thereof is otherwise provided for herein, shall be sent by the Producer by telegraphing, mailing or delivering the same to the last known address of the writer, of such notice may be delivered to the writer personally.

Q. The writer shall have no rights or claims of any nature against the Producer growing out of or concerning any determination of credits in the manner herein provided, and all such rights or claims are hereby specifically waived.

R. In the event that after the screen credits are determined as hereinabove provided, material changes are made in the script or photoplay which in the sole and absolute discretion of the Producer justify a revision in the screen credits, then the procedure for determining such revised credits will be the same as that provided for the original determination of credits.

S. The writer shall not claim credit for any participation in the screen play authorship of any photoplay, for which the credits are to be determined by the procedure herein provided for, prior to the time when such credits have in fact actually been so determined, and the writer shall not claim credits contrary to such determination.

T. In case of emergency the forty-eight (48) hour period mentioned in Paragraph M hereof may be reduced to twenty-four (24) hours.

U. The provisions of this Exhibit "X" shall not in any way be operative in connection with the determination of credits involving any writer or writers engaged by the Producer whose written consent (either by contract or otherwise) to the procedure set forth in this Exhibit "X" shall not have been first had and obtained, and shall not be operative in connection with any screen play to which any such writer was a contributor, and the Producer's determination of screen credits in each such instance shall be final.

V. No casual or inadvertent failure to comply with any of the provisions of this Exhibit "X" shall be deemed to be a breach of the contract of employment of the writer, or entitle him to damages or injunctive relief. [139]

[A copy of the document here attached as Plaintiff's Exhibit No. 2 appears elsewhere herein as Exhibit "B" attached to the Complaint.]

PLAINTIFF'S EXHIBIT No. 3

[Metro-Goldwyn-Mayer Pictures Letterhead]

December 2, 1947

Mr. Lester Cole
c/o Metro-Goldwyn-Mayer Studios
Culver City, California

Dear Mr. Cole:

At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee.

By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

This action is taken by us without prejudice to,

S. The writer shall not claim credit for any participation in the screen play authorship of any photoplay, for which the credits are to be determined by the procedure herein provided for, prior to the time when such credits have in fact actually been so determined, and the writer shall not claim credits contrary to such determination.

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V. No casual or inadvertent failure to comply with any of the provisions of this Exhibit "X" shall be deemed to be a breach of the contract of employment of the writer, or entitle him to damages or injunctive relief. [139]

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By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

This action is taken by us without prejudice to,

and we hereby reserve, any other rights or remedies which we may have.

Very truly yours,

LOEW'S INCORPORATED,
By /s/ LOUIS K. SIDNEY,
Asst.-Treasurer. [140]

[Endorsed]: Filed Nov. 22, 1948.

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5 IN THE UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
7 CENTRAL DIVISION

8 LESTER COLE,)

9 Plaintiff,)

10 vs)

11 LOEW'S INCORPORATED, etc.)

12 Defendants)
13
14

No. 8005-Y

Requested Jury Instructions
Refused by the Court

15 REFUSED: *Leon P. Yarnall*
16 Judge
17
18

19 *As [Endorsed]:*

FILED

DEC 17 1948

21 EDMUND L. SMITH, Clerk

22 By *John A. Centares*
23 Deputy Clerk
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PLAINTIFF'S REQUESTED INSTRUCTION NO. 1

use this

You are instructed that the burden is on the defendant to prove by a preponderance of the evidence sufficient justification, in accordance with the instructions of the Court, for suspending Mr. Cole. This means that before you can find that the defendant was so justified or that plaintiff conducted himself in a manner contrary to the morals clause of the contract, you must be satisfied by a preponderance of the evidence that every fact essential to show such justification is true.

Therefore, unless such justification is established by a preponderance of the evidence you must find that the plaintiff did not conduct himself in such a manner as to bring himself into public scorn, hatred, contempt or ridicule.

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DEC 10 1948

EDMUND L. SMITH, Clerk

By _____
Deputy Clerk

PLAINTIFF'S REQUESTED INSTRUCTION No. 2.

In this case plaintiff Lester Cole was employed by defendant Loew's Inc. under a written contract of employment; that contract ran until November 15, 1949, with certain options; now where, as here, an employer suspends an employee during the term of his contract, the law requires that the employer justify that suspension by a preponderance of the evidence. If the employer fails to so justify the suspension, you must then find that the suspension was not justified. Thus, as here, where the defendant notified plaintiff that it suspended the plaintiff upon the ground that Lester Cole so conducted himself as to bring himself in into public scorn, hatred, contempt or ridicule, it is necessary for the defendant to prove by a preponderance of the evidence that Mr. Lester Cole personally was held in public scorn, hatred, contempt or ridicule. If defendant has not established ^{these or either of these} (this by facts by a preponderance of the evidence then you must find that Lester Cole was not in fact in public scorn, hatred, contempt or ridicule.

For did his conduct shocked or offended the community or prejudiced the defendant or the industry in general
y. - and

PLAINTIFF'S REQUESTED INSTRUCTION NO. 3.

In this case, the plaintiff Lester Cole agreed in his contract with Loew's Incorporated that he would comply with the provisions of his contract "to the full limit of his ability or as instructed." In this case if you find that the defendant Loew's knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if defendant Loew's desired that plaintiff Lester Cole conduct himself before the committee in a certain manner, defendant Loew's had the right to give reasonable and specific instructions to Lester Cole. If you find that defendant Loew's made [misleading] statements to plaintiff Lester Cole and he reasonably relied on them, ^{and, in good faith, based his conduct on such} his conduct in reliance thereon cannot be deemed a basis for his suspension. Therefore, in this case, ^{if you find that the statements were made in such a manner which warranted Cole's submission} (if you find that Lester Cole did so reasonably rely,) you must find that he did not conduct himself in such a manner as to bring himself into public scorn, hatred, contempt or ridicule, or ^{but}.

^{He is dual (sic) Hatter. And same justification as rule d in Instr. 2.}

PLAINTIFF'S REQUESTED INSTRUCTION NO. 4

In this case, the plaintiff Lester Cole agreed in his contract with Loew's Incorporated that he would comply with the provisions of his contract "to the full limit of his ability or as instructed." If you find that plaintiff Lester Cole violated no instructions of defendant Loew's in his conduct before the committee, then you must determine whether he complied with the contract to the full limit of his ability. If you find that in his conduct before the committee the plaintiff Lester Cole in good faith conducted himself in a manner which he believed would not violate his obligation under the morals clause of the contract, you must find that he did not conduct himself in such a manner as to bring himself into public scorn, hatred, contempt or ridicule.

PLAINTIFF'S REQUESTED INSTRUCTION NO. 5

An employer cannot penalize an employee simply because the employer claims a violation of a contract. In order to justify a suspension or other penalty the employer must show that the employee wilfully and intentionally violated his contract. Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt or ridicule, you must find that he acted wilfully and intentionally in this regard.

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tial part of the public might think his conduct reprehensible. [158]

Plaintiff's Requested Instruction No. 11

Even if you find from the evidence that a substantial portion of the public hold Mr. Cole in public scorn, hatred, contempt or ridicule because of his conduct in Washington, this does not permit you to find that he was held in public scorn, hatred, contempt or ridicule if you also find that a substantial portion of the public approved of his action.

Plaintiff's Requested Instruction No. 12

In charging you concerning public scorn, hatred, contempt or ridicule, I have used the word "public." By this, I mean that part of the public with which the defendant could reasonably be concerned, such as theater-goers all over the country. [160]

Plaintiff's Requested Instruction No. 13

You are not to find that Mr. Cole was brought into public scorn, hatred, contempt or ridicule, unless you find that his conduct in fact influenced the public not to go to motion picture theaters.

Plaintiff's Requested Instruction No. 14

When a witness is called before a Congressional Committee he may not be required to answer a question "yes" or "no."

Requested by plaintiff and.....

.....,

District Judge. [162]

Plaintiff's Requested Instruction No. 15

When a witness is called before a Congressional Committee he has the right to invoke the protection of the Constitution of the United States, and to that end he has the legal right which is guaranteed to every citizen to assert rights reserved by the Constitution and to claim its privileges.

Requested by plaintiff and.....

.....,

District Judge. [163]

Plaintiff's Requested Instruction No. 16

A Congressional committee has no power to finally decide whether a witness before it may be required to answer a question in a particular manner or at all. If a witness wishes to have a final decision as to whether he is required to answer a question concerning his trade union or political affiliations, he can only obtain it by refusing to answer questions concerning such affiliations or answering them in his way, thus paving the way for contempt proceedings in the courts, where a final decision as to the power of the committee can be obtained. [164]

Plaintiff's Requested Instruction No. 17

Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional rights. This is one of the privileges of American citizenship. [165]

PLAINTIFF'S REQUESTED INSTRUCTION NO. 6.

To justify Loew's Incorporated in suspending this contract you must find that the "morals Clause" constituted in effect a specific, clear and final instruction to the plaintiff, and that the plaintiff, while acting as a free agent, intentionally violated this morals clause by his acts and conduct before the House Committee, and that while acting as a free agent he intentionally brought himself into public scorn, hatred, contempt or ridicule before the House Committee.

PLAINTIFF'S REQUESTED INSTRUCTION NO. 7.

If Mr. Cole could reasonably have come to the conclusion ~~from~~ the conduct and the statements of Mr. Mayer and Mr. Mannix that Mr. Cole should conduct himself as he thought proper ^{assuming that you find such statements have been made} before the Congressional committee, and if you find that Mr. Cole did come to that conclusion, then you are ^{and acted according to his best judgment} instructed that the defendant did not have the right to suspend Mr. Cole for anything arising out of Mr. Cole's conduct and testimony in Washington, and you must find that the plaintiff Lester Cole did not so conduct himself as to bring himself into public scorn, hatred, contempt or ridicule.

y - mod.

Plaintiff's Requested Instruction No. 8

The defendant in this case takes the position that Mr. Cole's conduct before the Congressional Committee has brought him into public scorn, hatred, contempt or ridicule. I charge you that you must not presume that anything Mr. Cole did in Washington has had that kind of effect, and before you can reach that conclusion you must be satisfied by a preponderance of the evidence that Mr. Cole was in fact brought into public scorn, hatred, contempt or ridicule. [156]

Plaintiff's Requested Instruction No. 9

You cannot find that Mr. Cole was brought into public scorn, hatred, contempt or ridicule unless you are satisfied by a preponderance of the evidence that on or before December 2, 1947, a substantial part of the public knew the name "Lester Cole" and knew about his conduct in Washington, and, as a result of that knowledge, held him in public scorn, hatred, contempt or ridicule. [157]

Plaintiff's Requested Instruction No. 10

Every citizen has a duty to take an interest in public affairs, and no citizen may, by contract with an employer, agree to refrain from taking a position in which he sincerely believes on controversial public issues. If you find that Mr. Cole's conduct in Washington constituted taking a position about which public opinion was divided, then you cannot find that he brought himself into public scorn, hatred, contempt or ridicule, even if any substan-

tial part of the public might think his conduct reprehensible. [158]

Plaintiff's Requested Instruction No. 11

Even if you find from the evidence that a substantial portion of the public hold Mr. Cole in public scorn, hatred, contempt or ridicule because of his conduct in Washington, this does not permit you to find that he was held in public scorn, hatred, contempt or ridicule if you also find that a substantial portion of the public approved of his action.

Plaintiff's Requested Instruction No. 12

In charging you concerning public scorn, hatred, contempt or ridicule, I have used the word "public." By this, I mean that part of the public with which the defendant could reasonably be concerned, such as theater-goers all over the country. [160]

Plaintiff's Requested Instruction No. 13

You are not to find that Mr. Cole was brought into public scorn, hatred, contempt or ridicule, unless you find that his conduct in fact influenced the public not to go to motion picture theaters.

Plaintiff's Requested Instruction No. 14

When a witness is called before a Congressional Committee he may not be required to answer a question "yes" or "no."

Requested by plaintiff and.....

.....,

District Judge. [162]

Plaintiff's Requested Instruction No. 15

When a witness is called before a Congressional Committee he has the right to invoke the protection of the Constitution of the United States, and to that end he has the legal right which is guaranteed to every citizen to assert rights reserved by the Constitution and to claim its privileges.

Requested by plaintiff and.....

.....,

District Judge. [163]

Plaintiff's Requested Instruction No. 16

A Congressional committee has no power to finally decide whether a witness before it may be required to answer a question in a particular manner or at all. If a witness wishes to have a final decision as to whether he is required to answer a question concerning his trade union or political affiliations, he can only obtain it by refusing to answer questions concerning such affiliations or answering them in his way, thus paving the way for contempt proceedings in the courts, where a final decision as to the power of the committee can be obtained. [164]

Plaintiff's Requested Instruction No. 17

Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional rights. This is one of the privileges of American citizenship. [165]

Plaintiff's Requested Instruction No. 18

As a matter of law, it is not morally reprehensible for a citizen to refuse to answer questions or to insist upon answering in his own way questions put to him by a Congressional committee. [166]

Plaintiff's Requested Instruction No. 19

The law recognizes that a man's duty as a citizen is superior to his right to enter into a contract or to his duties under a contract. No man has the right to bind himself by contract to exercise his privileges as a citizen in any particular manner or to take or to refrain from taking any particular political position.

Requested by plaintiff and.....

.....,

District Judge. [167]

Plaintiff's Requested Instruction No. 20

No employer has the right to coerce or influence any of his employees to follow any particular course or line of political action or political activity.

Requested by plaintiff and.....

.....,

District Judge. [168]

Plaintiff's Requested Instruction No. 21

Loew's, Incorporated, did not and does not have the right, under California law, to control or to direct Mr. Cole's political activities or his political affiliations. [169]

Plaintiff's Requested Instruction No. 22

If you find that the defendant's executives led plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or whether in fact that he was a Communist, or that he publicly refused to say that he was a Communist, but afterwards changed their minds without notifying Cole before he testified before the House Committee hearings, then I charge you that Cole had the right, so far as the defendant was concerned, to conduct himself in Washington as he thought proper without regard to any claim that because of his conduct the public might be led to believe that he was a Communist. [170]

Plaintiff's Requested Instruction No. 23

There is no Communism in this case. None of the parties or witnesses is charged in this courtroom with being a Communist. You are to consider the evidence and reach your verdict without trying to speculate about the political affiliations of any of the witnesses or parties.

Requested by plaintiff and.....

.....,

District Judge. [171]

Plaintiff's Requested Instruction No. 24

You are not to find that Mr. Cole was brought into public scorn, hatred, contempt or ridicule unless you are satisfied by a preponderance of the evidence that the attitude of the general public

toward Mr. Cole, if it had any, actually injured the defendant. [172]

Plaintiff's Requested Instruction No. 25

In determining whether the public had any attitude about Lester Cole, and, if it had any, whether the public held him in scorn, hatred, contempt or ridicule, you are to consider only the period between October 30, 1947, and December 2, 1947. [173]

Plaintiff's Requested Instruction No. 26

Loew's is a corporation, and can be injured or prejudiced only by something which diminishes its income or its power to earn income or by injury to its property or assets. This injury need not be immediate, it can take place in the future, but it is not an injury if it is guesswork or speculation. You are not to find that any conduct of Mr. Cole's injured or prejudiced his employer unless you find, by a preponderance of the evidence, that it diminished or will diminish its income or its power to earn income or has injured or will injure its property or assets.

Requested by plaintiff and.....

.....,

District Judge. [174]

Plaintiff's Requested Instruction No. 27

In considering whether Lester Cole's conduct (brought) did or did not bring him into public scorn, hatred, contempt or ridicule you are not to speculate or to guess. If you are not satisfied by a

preponderance of the evidence that such was the fact, you are to find that his conduct did not bring him into public scorn, hatred, contempt or ridicule.

Plaintiff's Requested Instruction No. 28

You are not to find that Lester Cole's conduct substantially lessened his value as an employee to the defendant unless you find by a preponderance of the evidence that, as a result of Cole's conduct, the income of the defendant would be diminished or its earning power would be diminished, or its property or assets would be injured.

Requested by plaintiff and.....

.....,

District Judge. [176]

Plaintiff's Requested Instruction No. 29

You are not to find that Mr. Cole's conduct before the House Committee prejudiced his employer unless you find by a preponderance of the evidence that his conduct diminished the income or earning power of the defendant, or injured its property or assets.

Requested by plaintiff and.....

.....,

District Judge. [177]

Plaintiff's Requested Instruction No. 30

You are instructed that even if an employer has the right to suspend an employee under a contract, he may waive this right; a waiver is such conduct

of the employer as warrants an inference of the election by the employer to forego the right to suspend which he might otherwise have taken or insisted upon under the contract.

An employer who is in a position to suspend an employee, may by the employer's words or conduct, and without reference to any act or conduct by the employee affected thereby, waive the right to suspend his employee. Once such right is waived by the employer it is gone and cannot be claimed by the employer except for some other or different violation by the employee.

By giving you this instruction on the law of waiver, I do not intend to express any opinion as to whether the defendant in this case did have the right to suspend the plaintiff in the first place.

56 C. J. S. 433

Jones v. Maria,
48 Cal. App. 171

Estate of Hein,
32 Cal. App. (2) 438

Carpenter Steel v. Norcross,
204 Fed. 537.

[Endorsed]: Lodged Dec. 10, 1948. [178]

[Title of District Court and Cause.]

PLAINTIFF'S SUPPLEMENTAL
REQUESTED INSTRUCTIONS

Plaintiff's Requested Instruction No. 31

If you find that before plaintiff Lester Cole testified at the hearings in Washington he was led to believe by statements of officers of Loew's that Loew's was not concerned about his political affiliations, I instruct you that Loew's is not in a position to claim that Lester Cole acted in such a manner that people were caused to believe that he was a Communist and that he thereby violated the public morals and conventions clause.

Goudal v. C. B. DeMille, etc., 118 Cal. App. 407.
Leatherberry v. Odell, 7 Fed. 641 (CC N.C.
1880).

Jones v. Vestry of Trinity, 19 Fed. 59. [180]

Plaintiff's Requested Instruction No. 32

If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

Goudal v. C. B. DeMille, etc., 118 Cal. App. 407.
Leatherberry v. Odell, 7 Fed. 641 (CCN.C. 1880).
Jones v. Vestry of Trinity, 19 Fed. 59. [181]

Plaintiff's Requested Instruction No. 33

If you find that Loew's by the statements of its officers to Lester Cole led him to believe that the

public morals and conventions clause had no application to political activity or affiliation, then Cole could rely on those statements, and the clause should be construed as not applying to political activity or affiliation.

4 Cal. Juris Supp., pp. 133-4.

Fitzgerald v. First National Bank, 114 Fed. 474.

O'Connor v. Automatic Irrigation Co., 242 Mich. 204. [182]

Plaintiff's Requested Instruction No. 34

The employment contract requires Cole to observe his obligations conscientiously and to the best of his ability. This includes his obligations under the public morals and conventions clause. Therefore, you are instructed that the contract puts a duty on Cole to use his best judgment in determining in a situation where he has a free choice whether one line of conduct will breach his obligations under said clause and another will not; and if Cole honestly exercised his best judgment, you must find that he acted conscientiously and to the best of his ability and did not within the meaning of the contract so conduct himself as to bring himself into public scorn or contempt, or so as to shock or offend the community, or so as to prejudice his employer or the motion picture industry generally.

Goudal v. C. B. DeMille Pictures, Corp., 118 Cal. App. 407. [183]

Plaintiff's Requested Instruction No. 35

Where an employee agrees to comply conscientiously

tiously and to the best of his ability with the terms of an employment contract which are general in their nature and he has no specific instructions from his employer, he must reasonably and honestly exercise his best judgment in complying with these general terms, and if he does so, the employer may not thereafter treat such conduct as a breach of the employee's obligations.

Goudal v. C. B. DeMille Pictures Corp., 118 Cal. App. 407. [184]

Plaintiff's Requested Instruction No. 36

Cole, as an employee of Loew's, had the right to rely on the statements of its officers and representatives concerning the extent of his obligations as an employee and concerning its attitude towards his actual and alleged political affiliations and activities, and towards its and the motion picture industry's attitude toward the hearings conducted by the House Committee on Un-American Activities. In determining whether plaintiff Cole reasonable relied upon any statements of officers or representatives of defendant Loew's in conducting himself as he did before the Committee, you should consider the evidence concerning statements made to Cole by officers of Loew's as to their concern or lack of concern with his political affiliation and activities as well as public statements of representatives of Loew's and of the industry with respect to the Committee hearing.

3 Williston on Contracts, 623.

Fitzgerald v. First National Bank, 114 Fed. 373 CCA 8, 1902). [185]

Plaintiff's Requested Instruction No. 37

If the officers of the defendant Loew's led Cole to believe by their conduct and statements to him that Cole did not owe his employer any duty with respect to what he did or said in responding to the subpoena of the House Committee on Un-American Activities, then you are instructed that Loew's waived its right to take any action against Cole because of his conduct before the said Committee.

3 Williston on Contracts, 623.

Fitzgerald v. First National Bank, 114 Fed. 474 (CCA 8, 1902). [186]

Plaintiff's Requested Instruction No. 38

If an employer leads an employee to believe that a course of conduct by the employee with respect to certain matters is no concern of the employer, then I instruct you that the employer may not thereafter treat such conduct as a breach of the employees' obligations.

3 Williston, on Contracts, 623.

Fitzgerald v. First National Bank, 114 Fed. 474 (CCA 8, 1902). [187]

Plaintiff's Requested Instruction No. 39

An employee has a right to rely on statements of the officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct violates his obligations as an employee.

3 Williston, on Contracts, 623.

Fitzgerald v. First National Bank, 114 Fed. 474 (CCA 8, 1902). [188]

Plaintiff's Requested Instruction No. 40

If you find that the statements made to Cole and the public statements known to Cole and made by officers and representatives of defendant with respect to their attitude toward the House Committee on Un-American Activities and toward the political activity and affiliations of their employees were unclear, ambiguous or conflicting and that Lester Cole reasonably and in good faith believed that his conduct was not contrary to his employer's interpretation of the public morals and conventions clause, you must find that Lester Cole acted according to his best judgment under the circumstances and did not within the meaning of the contract breach the said public morals and conventions clause.

Park Bros. v. Bushnell, 60 Fed. 583.

Prescott v. Buffalo, 260 N.Y.S. 840.

La Jewett v. Coty, 275 N.Y.S. 822. [189]

Plaintiff's Requested Instruction No. 41

Where an employer makes ambiguous statements to an employee and the employee thereafter relying upon such statements conducts himself in accordance with his reasonable understanding of such statements, the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

Park Bros. v. Bushnell, 60 Fed. 583.

Prescott v. Buffalo, 260 N.Y.S. 840.

La Jewett v. Coty, 275 N.Y.S. 822. [190]

Plaintiff's Requested Instruction No. 42

The parties are bound by the construction placed by themselves upon an agreement between them.

4 Cal. Juris Supp., pp. 133-4.

Fitzgerald v. First National Bank, 114 Fed. 474.

O'Connor v. Automatic Irrigation Co., 242 Mich. 204. [191]

Plaintiff's Requested Instruction No. 43

If you find that when Cole came back from Washington, Loew's knew of Cole's statements and conduct before the House Committee in Washington but nevertheless put him back to work and accepted his services with the intention of accepting Cole as its employee under the employment contract, then I instruct you that Loew's waived the right to rely upon such conduct in taking action against Cole.

In re Nagel, 278 Fed. 105 (CCA 2, 1941).

Goudal v. C. B. DeMille, etc., 118 Cal. App. 407.

Leatherberry v. Odell, 7 Fed. 641 (CC N.C. 1880). [192]

Plaintiff's Requested Instruction No. 44

An employer knowing of an employee's conduct may not continue employing him thereafter and at a later date treat the employee's conduct as a breach of his obligations.

In re Nagel, 278 Fed. 105 (CCA 2, 1921).

Goudal v. C. B. DeMille, etc., 118 Cal. App. 407.

Leatherberry v. Odell, 7 Fed. 641 (CC N.C., 1880). [193]

Plaintiff's Requested Instruction No. 45

Loew's could not, of course, take part in creating an attitude on the part of the public toward Cole and afterward have the right to take action against Cole because of that attitude. If you find that Loew's conduct before December 2, 1947, in part caused the alleged public attitude which was the basis for the suspension, then you must find that Cole's conduct did not create that public attitude.

Civil Code, Sections 1511 (1) and 1512. [194]

Plaintiff's Requested Instruction No. 46

An employer may not treat as a breach of an employee's obligation the creation of a condition to which the employer's conduct has itself contributed.

Civil Code, Sections 1511 (1) and 1512. [195]

Plaintiff's Requested Instruction No. 47

Sections 1101 and 1102 of the California Labor Code read as follows:

"No employer shall make, adopt, or enforce any rule, regulation, or policy:

"(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

"(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

"No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or fol-

lowing any particular course or line of political action or political activity." [196]

Plaintiff's Requested Instruction No. 48

The words "politics" and "political activities" as used in the California Labor Code, Sections which I have just read to you includes the exercise of the rights and privileges or the influence by which individuals seek to determine or control public policy, the action of individuals seeking to influence or control the action of governmental officials, and the holding and expression of political principles, convictions, opinions, sympathies or the like.

The public morals and conventions clause must be interpreted and applied as excluding any control over the particular course or line of political action or activity as above defined.

Lockheed Aircraft Corp. v. Superior Court, 28 Cal. (2d) 481.

Patterson "Free Speech in a Free Press", p. 7.
Smith v. Higinbotham, 48 Atl. (2nd) 754.

Lawnside v. Haddon Farms, 25 Atl. (2nd) 905.

Plaintiff's Requested Instruction No. 49

Every citizen is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty. No contract may be used either by granting benefits nor imposing loss upon an employee to interfere with or influence an employee with respect to the manner in which he shall act in matters relating to the public good.

Nicholls v. Mudgett, 32 Vt. 543. [198]

Plaintiff's Requested Instruction No. 50

I instruct you that as a matter of law, plaintiff Lester Cole did not refuse to answer the question concerning his political affiliation put to him by the Committee.

Plaintiff's Pre-trial Brief, pp. 103-105. [199]

Plaintiff's Requested Instruction No. 51

You are instructed that under the laws of the State of California an employer may discharge an employee if that employee is guilty of gross immorality even though such gross immorality is not connected with the services of the employee.

And, you are further instructed that even if you should find that Mr. Cole did refuse to answer questions asked of him by the House Committee, such a refusal on his part did not constitute gross immorality as a matter of law.

Labor Code, Sec. 3005. [200]

Plaintiff's Requested Instruction No. 52

You are instructed that an employee must substantially comply with the directions of his employer concerning the services on which he is engaged, except where such obedience is impossible or unlawful and except where such obedience would impose new and unreasonable burdens upon the employee.

Thus, if you find that Mr. Cole did substantially comply with the directions of his employer, then you must find that he did not violate paragraph 5 of his employment contract.

Further, even if you should find that Mr. Cole did not substantially comply with the directions of his employer, then you must consider whether obedience by Mr. Cole was impossible or would impose new or unreasonable burdens upon him.

Labor Code, Sec. 2856.

Lodged Dec. 13, 1948.

[Endorsed]: Filed Dec. 17, 1948. [201]

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS

Defendant Loew's Incorporated hereby respectfully requests that the annexed instructions, and such additional ones as may be timely requested in the course of the trial hereof, be included in the Court's charge to the jury.

The instructions annexed hereto and numbered respectively 1 to 8, inclusive, are requested upon the assumption that, as indicated at pre-trial conferences would be the Court's practice, the Court will submit the issues of fact herein to the jury in the form of a special verdict and that no general verdict will be submitted, so that it will not be necessary to charge the jury upon the substantive questions of law involved herein. Defendant expressly reserves the right to request specific instructions covering such substantive questions of law in the event it is [201-A]

determined to submit a general verdict to the jury.

Dated November 30, 1948.

IRVING M. WALKER,
HERMAN F. SELVIN,
LOEB & LOEB,

By HERMAN F. SELVIN,
Attorneys for Defendant. [201B]

Defendant's Requested Instruction No. 1

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose.

Requested by defendant and

.....,

District Judge. [201-C]

Defendant's Requested Instruction No. 2

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion

relating to any of these matters, I instruct you to disregard it.

Requested by defendant and

.....,

District Judge. [201-D]

Defendant's Requested Instruction No. 3

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Requested by defendant and

.....,

District Judge. [201-E]

Defendant's Requested Instruction No. 4

In this case you will be given a special verdict which you are to return. That verdict consists of a number of questions, each one of which you will

answer "Yes" or "No" according to how you find the fact to be from a consideration of all the evidence before you. You will consider each of these questions separately and ballot on each one separately; and in order to return an answer all of you must be in agreement on the answer given.

Requested by defendant and.....

.....,

District Judge. [201-F]

Defendant's Requested Instruction No. 5

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions

of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.”

Requested by defendant and

.....

District Judge. [201-G]

Defendant's Requested Instruction No. 6

Certain facts in this case have been stipulated by the parties to be true. That means that those facts are established without the necessity of introducing any evidence of them and that they must be accepted as facts by you. The facts so stipulated in this case are:

[Here read to the jury the stipulated facts in the Pre-Trial Order.]

Requested by defendant and

.....,

District Judge. [201-H]

Defendant's Requested Instruction No. 7

In addition to stipulated facts and facts which are the subject of direct or indirect evidence, certain facts are the subject of judicial notice. Such facts, that is, facts which are the subject of judicial notice, are conclusively deemed to be known by the Court and jury and are, therefore, deemed established in the case without any evidence of them. Among the facts judicially noticed is the fact that many average and respectable persons in this country look with

scorn and contempt upon the Communist Party of America and upon its members and sympathizers.

Requested by defendant and

.....,

District Judge.

Spanel v. Pegler, (C.C.A. 7) 160 F. (2d) 619, 622;

Grant v. Reader's Digest, (C.C.A. 2) 151 F. (2d) 733, 734-5, cert. den. 326 U.S. 797;

Mencher v. Chesley, 297 N.Y. 94, 75 N.E. (2d) 259-60;

Gallagher v. Chavales, 48 Cal. App. (2d) 52, 57;

Wright v. Farm Journal, (C.C.A. 2) 158 F. (2d) 976, 978-9;

Washington Times Co. v. Murray, (C.A., D.C.) 299 Fed. 903, 905-6;

Annotation, 171 A.L.R. 709. [201-I]

Defendant's Requested Instruction No. 8

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. When you have agreed to an answer to each of the questions contained in the form of special verdict which the Clerk will hand you, your foreman will insert those answers in the appropriate blanks provided for that purpose, date and sign the verdict. You will then return with that verdict to this room.

Requested by defendant and

.....,

District Judge. [201-J]

Defendant's Requested Instruction No. 9

Certain words used in paragraph 5 of the contract here involved and which will appear in the questions which you will be called upon to answer are defined as follows:

(a) "Scorn" means to hold in extreme contempt; to reject as unworthy of regard; to despise, to condemn, to disdain.

(b) "Contempt" means the act of condemning or despising; the feeling with which one regards that which is esteemed mean, vile, or worthless; disdain; scorn.

(c) "Shock" means to offend the sensibilities; to disgust or horrify.

(d) "Offend" means to cause dislike, anger or vexation; to displease.

(e) "Prejudice" means to injure or damage by some action; to cause injury to; hence, generally, to hurt, damage, injure or impair.

Requested by defendant (as separate request with respect to each of the lettered subdivisions) and
a.; b.; c.; d.; e.

Webster's New International Dictionary quoted,
in part, in U. S. v. Ault, (D.C.), 263 Fed. 800,
810.

.....,
Judge.

[Endorsed]: Filed Dec. 1, 1948. [201-K]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED FORM OF
SPECIAL VERDICT

Defendant Loew's Incorporated hereby respectfully prays that, Pursuant to Rule 49(a), the attached form of special verdict be submitted to the jury herein. In that regard defendant expressly reserves the right to request additions to or changes in said proposed form as may be required or rendered necessary by the evidence admitted at the trial.

Dated November 30, 1948.

IRVING M. WALKER,
HERMAN F. SELVIN,
LOEB & LOEB,

By /s/ HERMAN F. SELVIN,
Attorneys for Defendant. [212]

SPECIAL VERDICT

We, the jury duly empaneled and sworn to try the within cause, hereby make the following answers to the following specific questions:

Question 1. Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the hearing held by said Committee, bring himself into public hatred, contempt, scorn or ridicule? (Answer "Yes" or "No.")

Answer:

Question 2. Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American [213] Activities and otherwise in connection with the hearing held by said Committee tend to shock, insult or offend, the community? (Answer "Yes" or "No.")

Answer:

3. Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the hearing held by said Committee, substantially lessen his value as an employee to the defendant Loew's, Incorporated? (Answer "Yes" or "No.")

Answer:

Question 3(4). Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the hearing held by said Committee, prejudice the defendant Loew's, Incorporated, as his employer, or the motion picture industry generally? (Answer "Yes" or "No.")

Answer:

Question 4(5). Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the hearing held by said Committee, prejudice the motion picture industry generally? (Answer "Yes" or "No.")

Answer:

Dated:, 1948.

.....,

Foreman.

[Endorsed]: Filed Dec. 1, 1948. [214]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO JURY

Given:

/s/ LEON R. YANKWICH,
Judge. [215]

I.

General Instructions

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right, nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the

case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the Court,—a wrong for which the parties would have no remedy, because it is conclusively presumed by the Court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion, and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your mind. In other words, it is not the greater number of witnesses which should control you where their evidence is satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

In weighing the evidence, you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence, their manner on the stand, their relations to the parties, if any, their degree of intelligence, and the reasonableness or unreasonableness of their statements, and the

strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty, or integrity, or by his motives or by the contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or comport with some fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

Such statements, arguments, comments or suggestions are not evidence and must not be considered

as such by you. [217] You must consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

In a civil case, such as this, the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence. The law does not require a demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. The burden is upon the plaintiff to prove his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively

establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." [219]

During the course of the trial, I have, at various times, asked questions of certain witnesses. My object in so doing was to bring out in greater detail certain facts not yet fully testified to by the particular witness. You are not to infer from the questions asked that I have any opinion as to the facts to which they related. If from these questions, you have inferred that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as such, and to disregard it in arriving at your own conclusion as to the particular facts, or as to other facts in the case. For I repeat: You are not to infer from anything I have said or done in this case that I

have any opinion as to the facts in the case which you are called upon to decide, or that I favor the claims or position of either party, or that certain witnesses are or are not to be believed or what inferences are to be drawn by you from their testimony. Any contrary impression you are free to disregard. [220]

II.

The Nature of the Action and the Contract

The action is for declaratory judgment and was instituted by the plaintiff, Lester Cole, who was employed by the defendant, Loew's, Incorporated, as a writer for motion pictures. Certain facts in this case have been stipulated to by the parties to be true. That means that those facts are established without the necessity of introducing any evidence of them and that they must be accepted as facts by you. The facts so stipulated in this case are before you.

The phase of the case with which the jury is concerned, relates to the notice served upon the plaintiff on December 2, 1947, which, omitting the date, title, salutation, and signature, reads:

“At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee.

“By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an em-

ployee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

“Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated [221] December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

“This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.”

It is the contention of the plaintiff that the defendant did not have the right to suspend him. This contention is contradicted by the defendant who asserts that it had the right to suspend under the written contract between the plaintiff and defendant, dated December 5, 1945, and more particularly, under the clause reading as follows:

“The employee agrees to conduct himself with due regard to public conventions and morals and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency,

or prejudice the producer or the motion picture, theatrical or radio industry in general." [222]

Clause (2) of the contract reads:

"(2) The employee agrees that throughout the term hereof he will write stories, adaptations, continuities, scenarios and dialogue and that he will render such other services in the editorial department of the producer as the producer may request; that when and as requested by the producer he will render his services as a producer and/or associate producer and in such other executive capacity, or capacities, as the producer may require and as the employee may be capable of performing; that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection herewith; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer. The term "photoplays" as used in this agreement shall be deemed to include, but not be limited to, motion picture productions produced and/or exhibited and/or transmitted with sound and voice recording, reproducing and/or transmitting devices, television, radio devices and all other improvements and devices which are now or hereafter may be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions." [223]

The clause in the contract under which the no-

tice of suspension was given defines certain conduct. The words used in the clause, some of which are carried over into the notice, are ordinary English words with the meaning of which you are familiar. Some of them, however, should be further defined.

To "shock" means to offend the sensibilities of someone; to strike with surprise, terror, horror or disgust.

To "offend" is to cause dislike or anger.

"Scorn" means the object of extreme disdain, contempt, or derision.

"Contempt" is the act of condemning or despising; the feeling with which one regards that which is considered mean, vile or worthless.

"Disdain, scorn" would also express the state of being despised, disgraced, shamed.

These words together, when applied to the conduct of a person, describe conduct which reflects on the character of a person and his name and standing in the community and tends to expose him to public hatred, contempt, scorn or ridicule, or which would shock, insult or offend the community.

The conduct must be such that a noticeable part of the community or a class of society whose standard of opinion we recognize, would be made to despise, scorn or be contemptuous of the person who is charged with such conduct.

In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the

particular instance referred to,—namely, his appearance before the Congressional Committee—was of such character that you, as [224] jurors, can say that, under our American standards of right conduct, it did shock or tend to shock and offend the community and/or brought the plaintiff—or tend to bring the plaintiff—into public scorn, hatred and contempt as herein defined. [225]

The verb “to prejudice” also appears in the clause of the contract by which the plaintiff agrees, among other things, not to do or commit any act or thing that will “prejudice the producer or the motion picture, theatrical or radio industry in general.”

The verb “to prejudice” is defined as follows: “To injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair, as to prejudice.”

In respect to this word also, you must determine whether the conduct of the plaintiff was such that you, as jurors, can say that, under our American standards of right conduct, which are accepted by the community of which you are a part, it was conduct which would injure or damage the defendant. And, in determining whether it would have such effect, you must consider whether the conduct would be considered an attack or reflection on the reputation of the defendant in its method of conducting its affairs through the employment as a writer of a person who acts as the plaintiff did under the circumstances. [226]

1 Even lawful actions may shock or offend certain persons and subject
2 the persons performing these acts to scorn and contempt. To illustrate:

3 If a man is sued for money owed, he may even though he has not paid the
4 money, defend the action on the ground that it was outlawed. Persons
5 holding high views of commercial ethics might be critical of one who makes
6 such a defense. But it could not be said that the community as a whole
7 or a good portion of it would be shocked or offended by the fact or that
8 it would subject the person making such defense to public scorn or con-
9 tempt.

10 Unless forbidden by state or federal law, or by the courts as against
11 public policy, an employer might, as a condition of employment, require,
12 in a written contract, that an employee do not perform certain acts,
13 which are not in themselves illegal. In such event, the employer might,
14 if the employee violated the condition, consider it a breach and take
15 whatever steps he may be allowed under the contract.

16 And in a law suit arising from such a controversy, the only factual
17 situation involved would be whether the designated prohibited act was
18 actually committed. But when, as here, the prohibited conduct is not
19 named specifically in the contract of employment, but is defined as con-
20 duct having a certain effect, then the jury is called upon to determine,
21 as questions of fact:

22 X (1) Whether the conduct was of the character forbidden by the con-
23 tract; and

24 X (2) Whether the employee was guilty of such conduct.

1 You are instructed that the burden is on the defendant
2 to prove by a preponderance of the evidence sufficient
3 justification, in accordance with the instructions of the
4 Court, for suspending Mr. Cole. This means that before you
5 can find that the defendant was so justified or that plaintiff
6 conducted himself in a manner contrary to the morals clause
7 of the contract, you must be satisfied by a preponderance
8 of the evidence that every fact essential to show such
9 justification is true.

10 Therefore, unless such justification is established
11 by a preponderance of the evidence you must find that the
12 plaintiff did not conduct himself in such a manner as to
13 bring himself into public scorn, hatred, contempt or

14 ridicule, *as that his conduct had any*
15 *of the other effects in the clause*
16

1 In considering whether Lester Cole's conduct
2 *and such effect*
3 ~~did or did not bring him into public scorn, hatred, contempt~~
4 ~~or ridicule~~ you are not to speculate or to guess. If you
5 are not satisfied by a preponderance of the evidence that
6 such was the fact, you are to find that his conduct did not
7 ~~bring him into public scorn, hatred, contempt or ridicule.~~

8 *as have any of the other effects in the clause*
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III
contracts between
THE LAW OF MASTER AND SERVANT *or Employee and Employee*

1 You are instructed that where an employment is under
2 a written contract for a definite period which defines the
3 rights and obligations of both parties, the conditions of the
4 contract are binding upon both parties. This means that the
5 contract is the sole measure by which the conditions relating
6 to ~~its~~ *the* existence, continuance and termination of the relation
7 of employer and employee are gauged. And any question
8 relating to performance or non-performance by either party
9 to the contract must be determined by ~~the~~ *the terms of the contract*

10 The Courts, in interpreting and enforcing contracts
11 of employment, have, however, laid down certain rules per-
12 taining to the mutual obligations of the parties in the
13 performance of the contract.

14 One of the principles is that "an agent or employee
15 is subject to a duty to his principal to act solely for the
16 benefit of the principal in all matters connected with his
17 agency *or employment*."

18 However, unless the contract of employment
19 specifically otherwise provides, an employee is not "neces-
20 sarily prevented from acting in good faith outside his em-
21 ployment in a manner which ^{*might*} injuriously affect his master's
22 business."

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1 An employer may consider a contract of employment
2 breached by the employee when the employee fails to perform
3 his duty under it or breaches the express or implied con-
4 ditions in the contract, even though injury does not result
5 to the employer in consequence of the employee's breach.
6 But the reason given must be true, from the standpoint of
7 the employer acting in good faith.

8 And where the contract specifies the grounds for its
9 termination or suspension, and written notice of such ground
10 is provided for, the employer, in order to justify his
11 action, must show that the ground given in the notice
12 actually existed. If he does not do so, by a preponderance
13 of the evidence, he cannot justify his action upon other
14 grounds named in the contract which, although true, were not
15 stated in the notice.

1 An employer cannot penalize an employee simply by claiming a
2 violation of a contract by the employee. In order to justify a claim
3 of violation and a suspension or other penalty allowed by the contract,
4 the employer must show that the employee's act charged as violation was
5 done or committed by the employee and that it was done wilfully and in-
6 tentionally. Thus, in order to find that the plaintiff so conducted him-
7 self as to bring himself into public scorn, hatred, contempt, or ridicule,
8 or to shock the community or prejudice the defendant, you must find ^{that the conduct had such tendency} ~~that~~
9 from all the evidence, and by a preponderance of the evidence, that his
10 conduct, which it is charged had that effect, was wilful and intentional. ^{or tended to have}

11 A "wilful" act is an intentional act. It does not necessarily
12 imply any evil intent on the part of the employee or malice on his part.
13 It does not necessarily imply anything blamable, or any ill will or wrong
14 toward the other party, or perverseness or moral delinquency, but merely
15 that the thing done or omitted to be done was done or omitted intention-
16 ally. It amounts to nothing more than this: That the person knows what
17 he is doing, intends to do what he is doing, and is a free agent when he
18 does it.

1 In performing his duties under this contract, the
2 plaintiff was required to comply substantially with its
3 terms.
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1 To apply these rules to the fact here: The plaintiff
 2 Lester Cole was employed by Defendant Loew's Incorporated
 3 under a written contract of employment; that contract ran
 4 until November 15, 1949, with certain options. Where, as
 5 here, an employer suspends an employee during the term of
 6 his contract, the law requires that the employer justify
 7 that suspension by a preponderance of the evidence. In this
 8 case, the defendant having notified the plaintiff that it
 9 suspended the plaintiff upon the ground that he so conducted
 10 himself at this hearing and in connection with it as to
 11 bring himself ~~but~~ tend to bring himself into public scorn,
 12 hatred, contempt or ridicule, or shock or offend or tend to
 13 shock or offend the community or prejudice the defendant
 14 or the industry in general, they must show, and you must be
 15 convinced by a preponderance of all of the evidence that such
 16 was the case, *before you answer the questions*
 17 *propounded to you in the affirmative*
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1 In determining whether the conduct of Lester Cole had
 2 such effect, or if it had any, *such effect?* you are to consider only the
 3 period between October 30, 1947, and December 2, 1947. This
 4 only means that the cause *of suspension* must have existed at that time. If
 5 it did exist, *and you so find,* then you may consider whether it continued
 6 after the date of the notice.
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*considered as a whole
and*

IV

THE ACTS OF THE EMPLOYER AS WAIVER

1 An employee has a right to rely on statements of
2 the officers and representatives of a corporation by which
3 he is employed in determining whether a certain course of
4 conduct would violate his obligations as an employee.
5

1 If an employer by his words and acts leads an employee
2 to believe that certain conduct by the employee will not be
3 considered a violation of his employment obligations, and
4 the employee, in good faith, acts in such belief, then the
5 employer may not thereafter be allowed to treat such conduct
6 as a breach of the employee's obligations.
7

in this case

1 If Mr. Cole, in good faith, did come to the conclusion, from the
2 actions and the statements of the executives of the defendants, Mr. Mayer
3 *and as a fact,*
4 and Mr. Mannix, that Mr. Cole could conduct himself as he thought proper
5 before the Congressional Committee, assuming that you find such actions
6 took place and such statements were made, you are instructed that Cole had
7 the right to use his best judgment as to what his conduct before the com-
8 mittee should be.
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expected to put it differently and more

1 If you find that the defendant's executives, Mr. Rayer and Mr.
 2 Mannix, performed certain acts and made certain statements, and by such
 3 actions and such statements, before the hearings, led the plaintiff Lester
 4 Cole to believe that they were not concerned about charges that he was a
 5 Communist, or that *and gave him no specific instructions as to* he was a Communist, — and Cole, in good faith, relied
 6 on such statements and actions in deciding upon a line of conduct before
 7 the Committee, — but that the defendant's executives afterwards changed
 8 their minds, without notifying Cole, before he testified before the House
 9 Committee, then *and without giving him any specific instructions* I instruct you that Cole had the right to pursue the con-
 10 duct he had decided upon on the basis of the *pro* facts and statements referred
 11 to, *if you find them to be true and have reported* without regard to any later claim by his employer that because of his
 12 conduct the public might be led to believe that he was a Communist. *(variable claim)*

1 In this case, the plaintiff Lester Cole agreed
2 in his contract with Loew's Incorporated that he would comply
3 with the provisions of his contract "to the full limit of
4 his ability or as instructed." ~~In this case, if you find~~
5 that the defendant Loew's knew that Lester Cole had been
6 subpoenaed to appear before the House Committee on Un-American
7 Activities, then I instruct you that if defendant Loew's
8 desired that plaintiff Lester Cole conduct himself before
9 the committee in a certain manner, defendant Loew's had the
10 right to give reasonable and specific instructions to Lester
11 Cole. ~~If you find that defendant Loew's made statements to~~
12 ~~plaintiff Lester Cole and he reasonably relied on them, and,~~
13 ~~in good faith, based his conduct on such reliance, I instruct~~
14 ~~you that his conduct in reliance thereon cannot be deemed~~
15 ~~a basis for his suspension. Therefore, in this case, if you~~
16 ~~find, that the statements relied on were of a character which~~
17 ~~warranted Cole's subsequent act, you must find that he did~~
18 ~~not conduct himself in such a manner as to bring himself~~
19 ~~into public scorn, hatred, contempt or ridicule, or that~~
20 ~~his conduct failed to shock or offend the community or prejudice~~
21 ~~the defendant or the industry in general.~~

22 and that it was his duty to
23 follow them, if they were
24 reasonable, as the contract
25 provides,
26

1 You are instructed that you are not concerned with the
 2 legality of the existence of the Un-American Activities
 3 Committee. *of the Congress of the United States*
 4 *and I instruct you that it was as legally constituted*
 5 Nor is there right to inquire into certain matters before you. *must*
 6 You must assume that the right to *exists*. *as I instructed you.*
 7 Congressional inquiry through committees is a necessary and
 8 legal adjunct to the democratic process, and fruitful recom-
 9 mendations and legislation have *all times* resulted from such inquiries.

9 In exercising the right of inquiry, a congressional
 10 committee may subpoena witnesses and ask them questions
 11 relevant to the inquiry. However, a witness examined before
 12 the committee also has rights. He may decline to answer
 13 certain questions in order to secure from the courts a final
 14 determination of the right of the committee to ask the
 15 questions. When he does so, he paves the way for contempt
 16 proceedings in the courts *and not before the committee*, where a final decision as to the
 17 power of the committee can be obtained. *in the particular case, i.e., in the courts*

1 When a question is asked of a witness before a Committee,
 2 he may give either a direct or an irresponsive answer. If
 3 the question is of such character as to require an explicit
 4 answer, he may be directed to give such answer. But he cannot
 5 be required to answer in a specific manner and without being
 6 given an opportunity to explain his answer. Nor can he be
 7 denied the right to amplify it. And there is nothing wrong
 8 if the answer which the witness gives goes beyond the question,
 9 or is what we ~~call~~ *in law* call non-responsive.

10 A non-responsive answer, if it includes irrelevant
 11 facts, may be stricken. If it contains relevant facts, they
 12 are admissible, notwithstanding the fact that they were not
 13 specifically asked for or called for by the *particular* question.

1 When a witness is called before a Congressional
 2 Committee he has the right to invoke the protection of
 3 the Constitution of the United States, and to that end he
 4 has the legal right which is guaranteed to every citizen
 5 to assert rights reserved by the Constitution and to claim
 6 *and the Law*
 7 *privileges.*

1 In this respect, the Supreme Court has said:

2 An official inquisition to compel disclosures of
 3 fact is not an end, but a means to an end; and the end must
 4 be of a legitimate one to justify the means. The citizen,
 5 when interrogated about his private affairs, has a right
 6 before answering to know why the inquiry is made; and if
 7 the purpose disclosed is not a legitimate one, he may not be
 8 compelled to answer.

1 And before a witness can be guilty of contempt of a
 2 legislative committee two conditions must concur:

3 (1) The questions asked of the witness must be
 4 relevant to the purpose of the inquiry, i.e., it must be
 5 required in a matter into which the Committee has the juris-
 6 diction to inquire, *and*

7 (2) The witness must actually refuse to answer the
 8 relevant question.

9 Or, conversely put:

10 "A witness rightfully may refuse to answer where
 11 the bounds of the power are exceeded or the questions are
 12 not pertinent to the matter under inquiry."
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Whether he is right or wrong, and even though
 he may be subjected to penalties if he is wrong, every
 citizen has the right ~~to~~ ^{or they legal} have determined by the courts
 questions as to his Constitutional rights. This is one of
 the privileges of ~~American citizenship~~ [^] and incidents

of American citizenship
 And even ~~the alien~~ in our
 midst, if he be a legal resident,
 has certain rights and
 privileges which he may
 assert and which it is
 the duty of ~~courts~~ a legislative
^{the} to respect and ^{of the}
 courts to protect.

1 You are instructed that even if an employer has the
2 right to suspend an employee under a contract, he may, by
3 his words or conduct, and without reference to any act or
4 conduct of the party affected thereby, waive this right. A
5 waiver, is such conduct of the employer as shows his election
6 *with full knowledge of all the facts and this right*
to forego the right to suspend, which he might otherwise have
7 taken or insisted upon under the contract. Once such right
8 is waived by the employer, it is gone, *as for the particular case* and cannot be claimed
9 by him, except for some other or different violation by the
10 employee.
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*with full knowledge of all the facts of his
rights in the matter,*

To put it into a brief sentence: An employer knowing of ^{and of his rights under the circumstances} an employee's conduct which might warrant suspension or ^{after such knowledge} termination of employment may not continue employment ^{and} him thereafter and at a later date treat the employee's conduct as a breach of his obligation.

So, here, if you find that when Cole came back from Washington, Loew's knew of Cole's statements and conduct before the House Committee in Washington in connection with the particular hearings, ^{and knew fully what they meant with respect to the circumstances} but nevertheless, put him back to work, and accepted his services with the intention of accepting Cole as its employee under the employment contract, then I instruct you that Loew's waived the right to rely upon such conduct in taking action against Cole.

As to these questions, ^{the existence of non-existence of the facts, claimed as right} authorization before Cole's appearance in Washington, ^{the existence of non-existence of the facts, claimed as right} and ^{and the rights flowing from} waiver, with full knowledge of the facts, after the appearance, the burden is on the plaintiff to prove their existence or the existence of either of them by a preponderance of the evidence.

VI

^{Further} SOME GENERAL INSTRUCTIONS AS TO THE RESPECTIVE RIGHTS OF EMPLOYER AND EMPLOYEE

No employer has the right to coerce or influence any of his employees to follow any particular course or line of political action or political activity. However, parties to an employment contract may agree not to engage in certain particular activities at certain definite times.

^{historical} a man has a right to run for office. But a contract of employment may prohibit an employee from running for office or campaign for office on the employer's expense, ^{illustrate}

The word "political" is defined as follows:

"Of or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals parties, or interests that seek to control the appointment or action of those who manage the affairs of state".

"Politics" is defined as follows:

"The science and art of government; the science dealing with the organization, regulation, and administration of a state, in both its internal and external affairs; political science . . . The theory or practice of managing or directing the affairs of public policy or of political parties; hence, political affairs, principles, convictions, opinions, sympathies, or the like " .

VII

*Re Question of*COMMUNISM, ~~IS NOT A CRIME~~

In view of the fact that the conduct of the plaintiff which is made the ground of suspension involved his failure to answer concerning his membership ^{in a professional union and} in the Communist party, the court will give you some specific instructions as to the bearing of the question on the problem before you.

You are instructed that in California it is libelous to call a person a Communist. This for the reason that such ^{recharge} ~~membership~~ would expose a person to ^{the} hatred, contempt and ridicule of many persons.

At the same time, I instruct you that in California it is lawful for a person to be a member of the Communist Party, and to register with the Registrar of Voters of a County as a member of such party. In California, the Communist party is entitled to participate in elections, including primary elections, and to nominate candidates. And, while, under California law, any party which carries on or advocates the overthrow of the Government by unlawful means or which carries on or advocates a program of sabotage may not participate in primary elections, the Courts of California have ruled that the courts do not take judicial notice of the fact that the Communist party advocates the overthrow of the Government by force or violence, and that ^{they have also ruled} a registered Communist is not guilty of a violation of the State law by the mere fact of membership in the Communist Party.

You are to bear these facts in mind in judging whether the conduct of the plaintiff was as charged by the defendant. And in determining this matter, you are to bear in mind the following facts and additional instructions.

1 I have stated that in California an accusation of
 2 Communism against a person is libelous. This is so because,
 3 under California law, every false and unprivileged publication
 4 which exposes a person to hatred, contempt, ridicule or obloquy
 5 or causes him to be shunned or avoided, or which has a
 6 tendency to injure him in his occupations is libelous
 7 per se.

8 The law recognizes in every man a right to have the
 9 estimation in which he stands in the opinion of others
 10 unaffected by false statements to his discredit.

11 In this manner, the law, recognizing that men's reputations
 12 are "tender things", ^{and} presumes that every person has a good
 13 reputation.

14 For this reason, the law does not require one who has
 15 been libelled to prove its falsity. On the contrary, falsity is presumed if the
 16 publication is of a character to affect his reputation, such as a ^{and unprivileged, i.e. not uttered in a judicial or legislative} ~~publication~~ ^{charge of Communism} ~~is~~ ^{may be}
 17 charged of Communism ~~is~~ ^{may be}

18 ~~And~~ the person who libels another has the burden of ^{Proving}
 19 proving that the charge is true. He who repeats a libelous ^{another has made}
 20 statement, if he wishes to justify it, must prove not that ^{the}
 21 the statement, but that the statement is true. ^{and}

22 These principles should be borne in mind by you in
 23 considering the testimony in this case in which reference was
 24 made to certain accusations made against the plaintiff in
 25 certain publications and before the Committee which were
 26 repeated and discussed in the presence of some of the defend-
 27 ant's representatives. You were admonished at the time when
 28 these accusations were repeated here and I admonish you again
 29 now that they are to be considered only as having been made and
 30 that no one has proved in this law suit that these accusations
 31 are true. Indeed, the truth of these accusations is not an
 32 issue in the case. And the reason, as already stated,

1 You are instructed that the defendant has not charged
2 that the plaintiff is a Communist or a member of the Com-
3 munist party and that the notice of suspension involved
4 here does not set forth as a ground of suspension the fact
5 *if he is not* that the plaintiff is or ever has been or was at the time
6 of the notice, a Communist or a member of the Communist
7 party. As you have already been instructed, the defendant,
8 having, in accordance with the contract of employment,
9 specified in the notice, the ground on which they relied
10 for suspension, is bound by it. And the only ground of
11 suspension set forth in the notice is the conduct of the
12 plaintiff before the Un-American Activities Committee of
13 the Congress *in connection with certain hearings and* at the time specified of his appearance
14 before that Committee. All the evidence on the part of
15 both the plaintiff and the defendant has been directed to
16 that conduct. And the question whether the plaintiff is
17 or is not, was or was not, a Communist, is not before you.
18 All you have to determine is whether in not answering
19 in the manner requested by the Committee, the question
20 among others, whether he was a Communist, *or a member of a trade* and whether his
21 entire conduct before the Committee was of the type *in connection with the hearings*
22 forbidden by what has been called the "public relations"
23 clause as bringing the plaintiff into public scorn and
24 contempt, shocking and offending the community and pre-
25 judicing the defendant and the industry.

1 And, in determining this matter, you are to consider
 2 the evidence and reach your verdict without trying to speculate
 3 about the political affiliations of any of the witnesses or
 4 or parties. *in this case*

Civil - Individual Opinion VII
CONCLUDING WRITTEN INSTRUCTION

1 It is your duty as jurors to consult with one another
 2 and to deliberate, with a view to reaching an agreement, if
 3 you can do so without violence to your individual judgment.
 4 You each must decide the case for yourself, but should do so
 5 only after a consideration of the case with your fellow
 6 jurors, and you should not hesitate to change an opinion
 7 when convinced that it is erroneous. However, you should
 8 not be influenced to vote in any way on any question sub-
 9 mitted to you by the single fact that a majority of the
 10 jurors, or any of them, favor such a decision. In other
 11 words, you should not surrender your honest convictions
 12 concerning the effect or weight of evidence for the mere
 13 purpose of returning a verdict or solely because of the
 14 opinion of the other jurors.
 15
 16
 17

[Title of District Court and Cause.]

SPECIAL VERDICT

We, the Jury, duly empaneled and sworn to try the within cause, hereby make the following answers to the following specific questions:

Question 1: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer "yes" or "no".)

Answer: No.

Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer "yes" or "no".)

Answer: No. [257]

Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally? (Answer "yes" or "no".)

Answer: No.

Question 4: Did the defendant Loew's Incorporated by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against

him by suspending him? (Answer "yes" or "no".)

Answer: Yes.

Dated this 17th day of December, 1948.

/s/ MRS. HAZEL B. OLNEY,
Foreman.

[Endorsed]: Filed Dec. 17, 1948. [258]

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO FORM OF
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDGMENT

Defendant objects to the form of the Findings of Fact and Conclusions of Law and Judgment proposed by plaintiff herein and, pursuant to Local Rule 7, specifies its objections as follows:

I.

Objects to the making of any Findings of Fact herein on the ground that all triable issues of fact were required to be submitted to and determined by a jury, so that the Court is without power or authority to find, resolve or determine any facts whatever, but is limited to drawing Conclusions of Law from, and declaring the rights of the parties on the basis of, the facts admitted by the parties and the facts found by the jury.

II.

In the event Findings of Fact are to be made defendant, without waiving its general objection here-

inabove stated and in [259] addition thereto, objects to the proposed findings as follows:

(a) Objects to the recital that the cause came on for "general equitable relief [page 1, line 21] inasmuch as the cause was one only for declaratory relief and limited injunctive relief.

(b) Objects to the recital that the questions of fact, referred to and quoted at pages 2 and 3 of the proposed findings, were submitted "pursuant to the request of the defendant" inasmuch as Question 4 was not requested by defendant at all and the other questions were not submitted in the form requested by defendant.

(c) Objects to the characterization of said questions of fact as "special interrogatories" [page 2, line 7] for the reason that in law they amounted to a special verdict and could have been special interrogatories only if they had been accompanied by a general verdict.

(d) Objects to the recital that "the parties stipulated in open court that neither desired to introduce any other or additional evidence before the Court" [page 4, line 27] for the reason that what actually occurred was not a stipulation but a separate and independent announcement by each party respectively that no further evidence on its behalf would be offered.

(e) Objects to Finding I(3) insofar as it purports to find full performance by plaintiff from or after December 3, 1947, inasmuch as plaintiff has not performed at all since that date.

(f) Objects to Finding I(5) upon the ground that it does not fully state the contentions of the defend-

ant and upon the further ground that in certain particulars it misstates said contentions, particularly in that defendant has never contended that said notice of suspension was [260] tantamount to a discharge, but has contended that by reason of plaintiff's alleged prior breach of contract defendant was excused from further performance on its part and that by availing itself of such excuse the contract may have been terminated or discharged.

(g) Objects to Findings I(6), (7), (8), (9), (10), (11) and (12) and separately to each of them upon the ground that they and each of them goes beyond any issue in the cause, and upon the further ground that they are not and none of them is supported by substantial evidence.

(h) Objects to Finding II upon the ground that it is general, vague, uncertain and argumentative.

III.

Defendant objects to the form of the Conclusions of Law proposed by plaintiff herein, as follows:

(a) Objects to concluding at all that no cause or ground existed for suspension, termination or discharge, inasmuch as such a conclusion is one of fact, not of law. Plaintiff's rights in this connection are adequately declared by concluding that defendant had no right to suspend the contract or refuse to perform under it for any reasons or grounds specified in the notice of suspension.

(b) Objects to Conclusion VI insofar as it finds full performance on the ground that to that extent it is a finding of fact and upon the further ground that it is contrary to the evidence.

(c) Objects to any conclusion that plaintiff is or will be entitled to receive his or any salary subsequent

[261] to the date of the trial of the cause, and to any order requiring such payment, upon the ground that the accrual of any such right is and will be dependent on many uncertain and unpredictable contingencies, upon the further ground that such right depends and will depend upon conditions, covenants and agreements, express and implied, not referred to or incorporated in the Conclusions of Law or in the Judgment, upon the further ground that a declaration should not be made in respect of future events, and upon the further ground that plaintiff's rights in this respect are adequately protected and declared by a declaration that the contract is in force and effect according to its terms.

(d) Objects to any order directing defendant to reinstate plaintiff to his contract of employment upon the ground that such order is uncertain and ambiguous, upon the further ground that it amounts to a mandatory injunction compelling specific performance of an ordinary contract, upon the further ground that it has the effect of enlarging plaintiff's rights and defendant's obligations under the contract in suit, and upon the further ground that it goes beyond any issue in the cause.

IV.

Defendant objects to the form of the Judgment proposed herein by plaintiff, as follows:

(a) Objects to the recitals of the proposed judgment in the same respects and for the same reasons as are specified in subparagraphs a, b, c and d of paragraph II of these objections with respect to similar or identical recitals in the proposed Findings.

(b) Objects to the declaratory and coercive [262] provisions of said proposed judgment in the same respects and for the same reasons as are specified in paragraph III of these objections with respect to similar or identical provisions of the proposed Conclusions of Law.

Dated December 27, 1948.

IRVING M. WALKER,
HERMAN F. SELVIN,
LOEB & LOEB,

By /s/ HERMAN F. SELVIN,
Attorneys for Defendant.

Objections considered and overruled.
/s/ LEON R. YANKWICH,
Judge.

September 29, 1948.

[Endorsed]: Filed Dec. 27, 1948. [263]

United States District Court
Southern District of California
Los Angeles, California

December 29, 1948

Leon R. Yankwich, District Judge.

To: Edmund L. Smith, Clerk, U. S. District Court:
Cole v. Loew's Inc., Civil No. 8005-Y

In the above-entitled case, enter the following order: "Objections to findings and judgment considered and overruled, except in matter indicated on page

2 of findings and judgment. Findings and judgment signed and filed. Execution of judgment stayed until January 31, 1949.”

/s/ LEON R. YANKWICH,
Judge, U. S. District Court.

[Endorsed]: Filed Dec. 30, 1948. [265]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause for declaratory and general equitable relief came on regularly for trial in this Court, before the Honorable Leon R. Yankwich, District Judge Presiding, sitting with a jury on the 30th day of November, 1948; plaintiff appearing in person together with his counsel, Robert W. Kenny, Esquire, Charles J. Katz, Esquire, and Ben Margolis, Esquire, of the firm of Gallagher, Margolis, McTernan & Tyre; the defendant, Loew's Incorporated, appeared, together with its counsel, Irving M. Walker, Esquire, and Herman Selvin, Esquire, of the firm of Loeb and Loeb; in accordance with the request of the defendant, a jury was impaneled in the mode and manner provided by law; the cause was tried before said jury, commencing on Tuesday, November 30, 1948, and on [266] Wednesday, December 1, 1948, at which date it was continued for further proceedings at the request of the parties until Wednesday, December 8, 1948, and thereupon the cause continued on trial from day to day thereafter, and until Friday, December 17, 1948; on Friday, December 17, 1948,

pursuant to the request of the defendant, [but not in the form requested by the defendant—L.R.Y.], the following questions of fact were submitted to the jury in the form of special interrogatories:

Question 1: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself, or tend to bring himself, into public hatred, contempt, scorn or ridicule? (Answer "Yes" or "No".)

Answer:

Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer "Yes" or "No".)

Answer:

Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer [267] or the motion picture industry generally? (Answer "Yes" or "No".)

Answer:

Question 4: Did the defendant Loew's Incorporated, by its conduct toward the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him? (Answer "Yes" or "No".)

Answer:

The cause was fully argued to the said jury by

Irving M. Walker and Herman Selvin on behalf of the defendant, and by Robert W. Kenny and Charles J. Katz on behalf of the plaintiff; thereupon, and following instructions by the Court, the said four special interrogatories were submitted to the jury, and on December 17, 1948, after deliberation the jury unanimously rendered a special verdict as follows:

Question 1: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself, or tend to bring himself, into public hatred, contempt, scorn or ridicule? (Answer "Yes" or "No".)

Answer: No.

Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on [268] Un-American Activities in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer "Yes" or "No".)

Answer: No.

Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally? (Answer "Yes" or "No".)

Answer: No.

Question 4: Did the defendant Loew's Incorporated, by its conduct toward the plaintiff, subsequent

to the hearing, waive the right to take action against him by suspending him? (Answer "Yes" or "No".)

Answer: Yes.

Immediately thereupon and at the request of the defendant, each of the said twelve jurors was polled and each stated in open court under oath that said special verdict was in fact his (or her) verdict.

On December 17, 1948, and after the submission of said special interrogatories to the jury, the parties stipulated in open court that neither desired to introduce any other or additional evidence before the Court, and thereupon the Court continued the matter for further proceedings until December 20, 1948.

Thereafter and on December 20, 1948, further proceedings were had before the Court, sitting without a jury, following which [269] the cause was submitted to the Court for decision.

On December 20, 1948, the Court announced and ruled that it accepted the special verdict of said jury and approved the same in all respects and adopted the same in all particulars.

The Court hereby adopts the special verdict of the jury in its entirety and upon the basis thereof and in the exercise of its own jurisdiction, the Court in accordance with the foregoing, and upon all the records and all of the evidence heard by the Court in this cause sitting both with and without said jury does now make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

The Court finds all of the following facts to be true:

1. Plaintiff is a resident of the County of Los Angeles, State of California. Plaintiff is by profession a writer, and has had long experience in working as a writer in the motion picture industry. Defendant, Loew's Incorporated, is a corporation organized under the laws of Delaware; it maintains a principal office and transacts business in the County of Los Angeles, State of California. It is engaged, among other things, in the business of producing motion pictures.

2. On December 5, 1945, plaintiff and defendant entered into an employment contract, a photostatic copy of which is now in evidence in these proceedings and marked Exhibit "2"; that thereafter, and on September 22, 1947, plaintiff and defendant entered into a written amendment to the said contract which is now in evidence in these proceedings, marked Exhibit "3"; by the terms of said contract of employment dated December 5, 1945, as so amended on September 22, 1947, the present term of said contract of employment began on November 15, 1947, and ends on November 15, [270] 1949, and provides for the payment of compensation by the defendant to the plaintiff at the rate of \$1,350.00 per week for each and every week during the term thereof, and by the further provisions of said contract of employment as amended, the defendant is granted certain options

to extend the period of said contract for further and additional terms beyond November 15, 1949.

3. Plaintiff has well and truly performed all of the terms, conditions and covenants of said contract of employment on his part to be performed, and was on December 2, 1947, and ever since said date has been and now is ready, willing and able to perform all of the terms, conditions, covenants, obligations and provisions of said contract on his part to be performed.

4. On or about December 2, 1947, the defendant, Loew's Incorporated, served upon the plaintiff, Lester Cole, a notice of suspension reading as follows:

“Loew's Incorporated
Metro-Goldwyn-Mayer Pictures
Culver City, California

December 2, 1947

Mr. Lester Cole
c/o Metro-Goldwyn-Mayer Studios
Culver City, California

Dear Mr. Cole:

At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee.

By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value as to as an employee, and prejudiced us as [271] your employer and the motion

picture industry in general. By so doing, you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.

Very truly yours,

LOEW'S INCORPORATED,
By LOUIS K. SIDNEY,
Asst. Treasurer."

5. A controversy affecting the rights of the parties under the said agreement and the amendment thereto in evidence in these proceedings as Exhibit "2" and Exhibit "3" does exist between plaintiff and defendant. Said controversy involves, among other things, the notice of suspension hereinabove set forth. By said notice of suspension the defendant purported to exercise a right to suspend the plaintiff's employment and payment of compensation to the plaintiff. Defendant contends and asserts that on December 2nd, 1947, it had, and that it now has, the right to suspend and to continue to suspend the

plaintiff's employment and to suspend and to continue to suspend payment of compensation to the plaintiff. [272]

In the course of the proceedings, defendant contended that if for any reason said notice of suspension was ineffective as a suspension of plaintiff, it was nevertheless tantamount to and was effective as a discharge of plaintiff.

Plaintiff contends that each and every statement of fact contained in the said notice of suspension is false and untrue; plaintiff further contends, notwithstanding the truth or falsity of any such statement in the said notice of suspension, the defendant did not on December 2, 1947, or at any other time have the right to suspend, and the defendant does not have the right to continue to suspend, the plaintiff's employment or payment of compensation to the plaintiff for any of the purported reasons, grounds, or conditions stated in the said notice of suspension; and the plaintiff further contends that no grounds or reasons existed on December 2, 1947, and none has existed since, and none exists now which gave or gives the defendant any right to suspend either the plaintiff's employment or payment of his compensation.

All of the contentions of plaintiff are supported by the evidence and the Court hereby finds them to be true; none of the contentions of defendant is supported by the evidence and the Court hereby finds them to be untrue.

6(a). The plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing

held by said Committee, did not bring himself, or tend to bring himself, into public hatred, contempt, scorn or ridicule.

(b) The plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, did not tend to shock, insult or offend the community.

(c) The plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities [273] in connection with the hearing held by said Committee, did not prejudice the defendant, Loew's Incorporated, as his employer or the motion picture industry generally.

(d) The defendant, Loew's Incorporated, by its conduct toward the plaintiff, subsequent to the hearing, did waive the right to take action against him by suspending him.

7. The grounds set forth in said notice of suspension are false and untrue.

8. The grounds set forth in said notice of suspension do not constitute any basis for such an order of suspension, and are not grounds for any order of suspension or for the termination of said contract, or for the discharge of the plaintiff.

9. The acts and conduct of the plaintiff before said House Committee were within the plaintiff's rights and did not constitute any breach on the part of the plaintiff of his contract of employment with the defendant.

10. The acts and conduct of the defendant prior to October 30, 1947, led plaintiff to belief, and the plaintiff did believe, that if plaintiff conducted him-

self before said House Committee and in connection with its said hearing in the manner in which plaintiff did there conduct himself, that such conduct of plaintiff would not give rise to the right on the part of defendant to suspend plaintiff's employment, or to discharge or otherwise discipline him.

11. On October 30, 1947, defendant knew what the acts and conduct of plaintiff were before said House Committee and in connection with said hearing; notwithstanding said knowledge, defendant after October 30, 1947, accepted and retained plaintiff in its employ pursuant to the provisions of said employment contract as amended, with the intent to keep him as defendant's employee under the terms and provisions of said contract as amended, and accepted the benefit of the services of plaintiff on the [274] screenplay "Zapata", and otherwise, until on or about December 3, 1947. Defendant with full knowledge of the aforesaid acts and conduct of plaintiff did not elect to treat them as a breach of contract, but on the contrary elected to maintain the contract in full force and effect, notwithstanding said conduct.

12. Defendant, Loew's Incorporated, did not at any time prior to or on October 30, 1947, instruct plaintiff as to how he should or should not conduct himself before said House Committee or in connection with its hearings.

13. The plaintiff has been and, unless this Court grants appropriate injunctive relief, will be irreparably injured in that by reason of said purported suspension plaintiff is required to refrain from seeking employment elsewhere and is required to remain un-

compensated and unemployed and is prevented from finding gainful employment in the motion picture industry and is prevented from writing and selling any literary material to any other motion picture producer, publisher, or theatrical producer.

II.

All of the factual matters alleged in plaintiff's complaint and not otherwise specifically found to be true by the foregoing Findings, are hereby found to be true; all the factual matters alleged in defendant's answer and not hereinbefore otherwise set forth, are hereby found to be untrue.

CONCLUSIONS OF LAW

Upon the said special verdict of the jury and upon the Findings of Fact hereinabove set forth, the Court makes the following Conclusions of Law:

I.

The plaintiff is entitled to a declaration that defendant, [275] Loew's Incorporated, does not now have and never has had any right to suspend plaintiff Lester Cole's employment or compensation pursuant to that certain notice of suspension served by the defendant upon the plaintiff on or about December 2, 1947, which notice of suspension is fully set forth in the Findings of Fact herein, or otherwise; that said notice of suspension is null and void; that the alleged conduct of plaintiff Lester Cole referred to in said notice of suspension, and each and all of the grounds relied upon by the defendant therein has and have never, and is and are not now any valid ground or grounds for the order of suspension; that

the action of the plaintiff, when appearing before the Committee and his entire conduct with relation to the hearings, either before or at or about the time, were within his rights and did not constitute a breach on his part of clause 5 of the contract which has been designated as the public relations morality clause, or any other portion of the contract; at no time has any ground existed nor does any ground now exist for the suspension or termination of the contract between plaintiff and defendant, a copy of which contract is attached hereto, marked "Exhibit A".

II.

The notice of suspension hereinabove set out and served by the defendant upon the plaintiff on or about December 2, 1947, is null and void.

III.

As a matter of law, no cause existed on or prior to December 2, 1947, and none has existed since that date, justifying the defendant in suspending said contract.

IV.

As a matter of law, no cause existed on or prior to [276] December 2, 1947, and none has existed since that date, justifying the defendant in terminating said contract.

V.

As a matter of law, no cause existed on or prior to December 2, 1947, and none has existed since that date, justifying the defendant in discharging the plaintiff.

VI.

The plaintiff has well and truly performed all of

the terms, conditions, covenants and obligations of said contract on his part to be performed and the said contract is now in full force and effect.

VII.

The notice of suspension hereinabove set out and served by defendant on plaintiff on or about December 2, 1947, was a breach on the part of the defendant of its obligations under its contract with plaintiff and a breach of the rights of plaintiff under said contract.

VIII.

The plaintiff is entitled to receive his salary from the defendant at the rate of \$1,350.00 per week for each and every week commencing December 2, 1947, and continuing until the date of the entry of this judgment and thereafter at the rate of \$1,350.00 per week as hereinafter provided; in the period between December 2, 1947, and December 30, 1948, a period of 56 weeks, there accrued the sum of \$75,600.00, and as at December 30, 1948, the said sum of \$75,600.00 accrued and remained unpaid, and said sum of \$75,600.00 is now due and payable by the defendant, Loew's Incorporated, to the plaintiff, together with interest thereon computed at the rate [277] of 7% per annum on each weekly sum of \$1,350.00 from the particular date during the period between December 2, 1947, and December 30, 1948, when each said weekly sum became due and continuing until the entire sum, plus such interest, is paid.

IX.

The plaintiff is entitled to an order directing defendant to reinstate plaintiff to his contract of em-

ployment, and to pay the plaintiff the sum of \$1,350.00 per week during each and every week subsequent to December 30, 1948, and continuing until November 15, 1949, and so long as plaintiff remains during said period, ready, willing and able to perform all of the terms, conditions and covenants of said contract on his part to be performed, excepting only that plaintiff is entitled to have and receive of the defendant six weeks' vacation with pay during the period between December 30, 1948, and November 15, 1949, and during said six weeks' period of vacation with pay, plaintiff should not be required to hold himself in readiness to render any services for the defendant, or to render any such services for the defendant, and provided in addition during the period December 30, 1948, through November 15, 1949, plaintiff is entitled to a leave of absence without pay, if the plaintiff elects to take the same for a period of six weeks during which plaintiff should not be required to hold himself in readiness to perform any services for the defendant, or to perform any such services, if the plaintiff elects to take such leave of absence.

X.

Plaintiff is entitled to an order directing the defendant forthwith to take appropriate corporate action to set aside, and to adopt appropriate resolutions setting aside, the said notice of suspension, dated December 2, 1947, and specifically described in [278] paragraph (4) of the Findings herein, and plaintiff is entitled to an order directing defendant forthwith to declare in writing that said suspension has been set aside and is at an end.

XI.

By reason of all of the facts hereinabove recited and found to be true, plaintiff is entitled to an injunction enjoining and restraining the defendant from in any mode or manner continuing such suspension in effect.

XII.

The Court should retain continuing jurisdiction over the plaintiff and defendant to enforce compliance by the plaintiff and defendant with the terms and provisions of this judgment, so that the plaintiff need not resort to any other proceeding in connection with the enforcement of the provisions of the judgment herein.

Dated this 29th day of December, 1948.

/s/ LEON R. YANKWICH,

Judge of the United States District Court. [279]

Received copy of the within proposed Findings of Fact and Conclusions of Law this 23rd day of December, 1948.

LOEB & LOEB,
HERMAN F. SELVIN,
IRVING M. WALKER,

By /s/ IRVING M. WALKER,
Attorneys for Defendant Loew's Incorporated.

[Endorsed]: Filed Dec. 30, 1948. [280]

In the United States District Court, Southern
District of California, Central Division

Civil Number 8005-Y

LESTER COLE,

Plaintiff,

vs.

LOEW'S INCORPORATED,

Defendant.

JUDGMENT

This cause for declaratory and general equitable relief came on regularly for trial in this Court, before the Honorable Leon R. Yankwich, District Judge Presiding, sitting with a jury, on the 30th day of November, 1948; plaintiff appearing in person, together with his counsel, Robert W. Kenny, Esquire, Charles J. Katz, Esquire, and Ben Margolis, Esquire, of the firm of Gallagher, Margolis, McTernan & Tyre; the defendant, Loew's Incorporated, appeared, together with its counsel, Irving M. Walker, Esquire, and Herman Selvin, Esquire, of the firm of Loeb and Loeb; in accordance with the request of the defendant, a jury was impanelled in the mode and manner provided by law; the cause was tried before said jury, commencing on Tuesday, November 30, 1948, and on [281] Wednesday, December 1, 1948, at which date it was continued for further proceedings at the request of the parties until Wednesday, December 8, 1948, and thereupon the cause continued on trial from day to day thereafter, and until Friday, December 17, 1948; on Friday, December 17, 1948, pursuant to the request of the defendant, [but not in the form

requested by the defendant—L.R.Y.], the following questions of fact were submitted to the jury in the form of special interrogatories:

Question 1: Did the plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself, or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer “Yes” or “No”.)

Answer:

Question 2: Did the plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer “Yes” or “No”.)

Answer:

Question 3: Did the plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudiced the defendant Loew’s Incorporated as his employer [282] or the motion picture industry generally? (Answer “Yes” or “No”.)

Answer:

At the request of the plaintiff, the following special interrogatory was submitted to the said jury:

Question 4: Did the defendant, Loew’s Incorporated, by its conduct toward the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him? (Answer “Yes” or “No”.)

Answer:

The cause was fully argued to the said jury by Irving M. Walker and Herman Selvin on behalf of the defendant, and by Robert W. Kenny and Charles J. Katz on behalf of the plaintiff; thereupon, and following instructions by the Court, the said four special interrogatories were submitted to the jury, and on December 17, 1948, after deliberation the jury unanimously rendered a special verdict as follows:

Question 1: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself, or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer "Yes" or "No".)

Answer: No. [283]

Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer "Yes" or "No".)

Answer: No.

Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally? (Answer "Yes" or "No".)

Answer: No.

Question 4: Did the defendant Loew's Incorporated, by its conduct toward the plaintiff, subsequent

to the hearing, waive the right to take action against him by suspending him? (Answer "Yes" or "No".)

Answer: Yes.

Immediately thereupon and at the request of the defendant, each of the said twelve jurors was polled and each stated in open court upon oath that said special verdict was in fact his (or her) verdict.

On December 17, 1948, and after the submission of said special interrogatories to the jury, the parties stipulated in open court that neither desired to introduce any other or [284] additional evidence before the Court, and thereupon the Court continued the matter for further proceedings until December 20, 1948.

Thereafter and on December 20, 1948, further proceedings were had before the Court sitting without a jury, following which the cause was submitted to the Court for decision.

On December 20, 1948, the Court announced and ruled that it accepted the special verdict of said jury and approved the same in all respects and adopted the same in all particulars.

In accordance with the foregoing, and upon all the records and all of the evidence heard by the Court in this cause, sitting both with and without said jury, and the Court having made and entered its Findings of Fact and Conclusions of Law, does now order judgment as follows:

I.

This Court hereby declares that defendant Loew's Incorporated does not now have and never has had any right to suspend plaintiff, Lester Cole's employ-

ment or compensation pursuant to that certain notice of suspension served by the defendant upon the plaintiff on or about December 2, 1947, which notice of suspension is fully set forth in paragraph VI below, or otherwise; that said notice of suspension is null and void; that the alleged conduct of plaintiff Lester Cole, referred to in said notice of suspension and each and all of the grounds relied upon by defendant therein has and have never and is and are not now any valid ground or grounds for the order of suspension; that the action of the plaintiff, when appearing before the Committee and his entire conduct with relation to the hearings, either before or at or about the time, were within his rights and did not constitute a breach on his part of clause 5 of the contract which has been designated as the public relations morality clause, or any other portion of the contract; at no time has any ground existed nor does any ground [285] now exist for the suspension or termination of the contract between plaintiff and defendant, a copy of which contract is attached hereto, marked "Exhibit A".

II.

That the plaintiff have and recover of the defendant the sum of \$1,350.00 per week for each and every week elapsed during the period beginning December 2, 1947, and continuing through and including December 30, 1948, amounting as at December 30, 1948, to the sum of \$75,600.00.

III.

That the defendant is hereby ordered and directed to reinstate the plaintiff to his employment with the defendant under and pursuant to that certain con-

tract of employment dated December 5, 1945, as amended by the parties in writing on September 22, 1947, a true and correct copy of which contract as so amended is annexed to this judgment, marked Exhibit "A" and made a part hereof as though specifically set forth verbatim at this point.

IV.

That the defendant, if it fails to comply fully with the provisions of paragraph III above, is hereby ordered to pay to the plaintiff during each week subsequent to December 30, 1948, through and including November 15, 1949, the sum of \$1,350.00 per week for each such week during which plaintiff continues to be ready, willing and able to perform all of the services required of him to be performed by the terms of said contract.

V.

That plaintiff recover interest at the rate of 7% per annum from the defendant on all sums due and payable by the [286] defendant to the plaintiff, as herein set forth, and that each weekly amount of \$1,350.00 so payable by the defendant to the plaintiff during the period commencing December 2, 1947, bear interest at the rate of 7% per annum until the date when each said weekly amount of \$1,350.00 shall have been paid by the defendant to the plaintiff.

VI.

That the defendant is hereby ordered forthwith to take appropriate corporate action to set aside, and to adopt appropriate resolutions declaring the suspension of Lester Cole at an end and setting aside and cancelling that certain notice of suspension

served by the defendant upon the plaintiff on or about December 2, 1947, which notice of suspension reads as follows:

“Loew's Incorporated
Metro-Goldwyn-Mayer Pictures
Culver City, California

December 2, 1947

Mr. Lester Cole
c/o Metro-Goldwyn-Mayer Studios
Culver City, California

Dear Mr. Cole:

At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee.

By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn [287] and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing, you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as

you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.

Very truly yours,

LOEW'S INCORPORATED,

By LOUIS K. SIDNEY,

Asst. Treasurer.

VII.

Upon all of the Findings of Fact and Conclusions of Law, together with the special verdict of the jury hereinbefore referred to, and because the said notice of suspension above set forth is null and void, and its continued enforcement will irreparably injure plaintiff in that by reason of said notice of suspension and the effectuation thereof, plaintiff is required to refrain from seeking employment elsewhere than with defendant while simultaneously being prevented from working for the defendant and is thus [288] totally excluded from employment in the motion picture industry and is prevented from writing and selling any literary material to any other motion picture producer, publisher or theatrical producer, it is hereby Ordered, Adjudged and Decreed that the defendant, its officers, agents, servants, employees and attorneys, and all persons acting in concert or participating with the defendant who receive actual notice hereof by personal service or otherwise, be, and they and each of them are, hereby enjoined and restrained from continuing in force or effect that certain notice of suspension served by the defendant

upon the plaintiff on or about December 2, 1947, which notice of suspension is fully set forth in paragraph VI above.

VIII.

This Court will retain jurisdiction over the parties for the purpose of enforcing the terms hereof and so that plaintiff need not resort to any other action to enforce the terms of this judgment, or any part thereof, or to obtain judgment for such additional sums in the future as may become due.

IX.

That plaintiff have and recover judgment against the defendant in the sum of \$78,398.64, and for his costs of suit incurred herein. Costs taxed at \$854.07.

Dated this 29th day of December, 1948.

/s/ LEON R. YANKWICH,
Judge of the United States District Court. [289]

[Copies of the documents here attached as Exhibits A and B appear elsewhere herein as Exhibits A and B, respectively, attached to the complaint.]

Received copy of the within proposed Judgment this 23rd day of December, 1948.

LOEB & LOEB,
HERMAN F. SELVIN,
IRVING M. WALKER,
By /s/ IRVING M. WALKER,
Attorneys for Defendant Loew's Incorporated.

Judgment entered Dec. 30, 1948.

[Endorsed]: Filed Dec. 30, 1948. [319]

[Title of District Court and Cause.]

OPINION

Appearances: For the Plaintiff: Kenny & Morris, Robert W. Kenny, Charles J. Katz, Los Angeles, California, Gallagher, Margolis, McTernan & Tyre, Ben Margolis, Los Angeles, California. For the Defendant: Loeb & Loeb, Herman Selvin, Milton A. Rudin, Irving M. Walker, all of Los Angeles, Calif.

Yankwich, District Judge:

The Court will adopt, as his own, the findings of the jury returned on the special verdict contained in the answers to the four questions propounded, and, on the basis of those answers and the findings which are implicit in the answers (1), the Court will make the following findings and declarations:

I.

The Jury's Verdict and Its Implications

The Court finds that the notice of December 2, 1947, given by Loew's, Incorporated, suspending the employment of the plaintiff, Lester Cole, for the reasons therein indicated, is null and void; that the ground therein stated—the appearance before the Committee—was not a valid ground for the order of suspension; that the action of the plaintiff, when appearing before the Committee, and his entire conduct with relation to the hearings, either before, at, or about the time of the hearing, were within his rights and did not constitute a breach on his part of Clause 5 of the contract which has been designated as the “public relations or morality” clause (2), or any other portion of the contract; that it was not

a ground either for suspension or for termination of the contract; that no other ground was stated in the notice and none has been shown to exist.

I find that, at that time, no ground existed for the suspension, or, rather, for the temporary or permanent termination of the contract between the plaintiff and the [323] defendant.

I find that plaintiff is entitled to receive from the defendant the salary which has not been paid to him since the notice of suspension, at the rate of \$1,350.00 per week, to the present time and until his reinstatement.

I find that the notice of suspension was a breach on the part of the defendant of its obligations under the contract and a breach of the rights of the plaintiff under it.

The defendant is ordered to reinstate the plaintiff, failing which, it is to continue to pay to him the weekly compensation under the contract.

The Court will retain jurisdiction for the purpose of entertaining any further proceedings in regard to the future actions of the parties, so that if the defendant should not reinstate him, the plaintiff need not resort to another action in order to recover compensation not yet earned, and which may become due, but may come into court without supplemental action, and have judgment for such additional sums in the future as may become due, either because of refusal of reinstatement or pending appeal.

Injunction will issue preventing the defendant from continuing in effect the notice of suspension,

and requiring them to enter a resolution upon the Minutes of the Board of Directors cancelling the effect of it and declaring the suspension at an end.

II.

The Grounds of Agreement

I now indicate that I adopt the findings of the jury, not because I feel bound to (as to which there may be a question), but because I am in entire agreement with the conclusions the jury has reached. Differently put, I am convinced that the conduct of the plaintiff in this case, which was made the basis of the notice, was not conduct which had any of the effects claimed by the notice. As a fact, there is doubt in my mind whether the notice of suspension clause applied to a situation such as this. (3) During the early stages of the case, I intimated that there is a possibility that this clause, the clause which allowed suspension for inability or refusal to perform, referred to acts other than those provided for in the morality clause. The morality clause declares certain conduct automatically to have certain effect.

The suspension clause, as I read it, lends itself to the interpretation that what they had in mind was some tempermental idiosyncrasy of a writer who, in the midst of a picture, would go on a party and not be on the job, or would decline to make changes in a script by reason of pride of authorship and thereby hold up production and the like. Otherwise put, the suspension clause contemplated things incidental to the performance by the writer of certain specific acts which would not amount to a breach of contract, or were of a [325] character that it would be unfair to

the employer to be put to that choice. So that they inserted the provision that if the writer failed to do certain things, he might be suspended without pay. But at the present time, this is an abstract proposition. And I adopt the view that the facts set forth in the notice, if true, and if they had the effect claimed for them could have justified the suspension, and state that I am in complete agreement with the finding of the jury that the conduct did not have the effect contemplated by the morality clause and that the conduct of the defendant towards the plaintiff, subsequent to the occurrence, at the time when they knew all that had taken place, (because the executive head of the studio, Mr. Mayer, was at the hearing and heard and knew everything that had taken place), that its conduct in returning the plaintiff to work and having him work on the play, *Zapata*, having him keep himself available and paying him a salary which continued for a long period of time, was a condonation and waiver, just as in the *Goudal-DeMille* case continuing *Jetta Goudal* in the performance of her work until the picture was completed was considered by the higher courts a ground of waiver, as I had held it to be in the trial of the case (4).

To my mind, it is inconceivable that any other conclusion could have been arrived at, after Mr. Louis B. Mayer, the executive head of the studio, had completed his testimony. I think that Mr. Cole owes a debt of gratitude to Mr. Mayer [326] for the forthrightness with which he testified. When he had finished, it was quite evident that, so far as MGM was concerned, and so far as the men actually in charge of production were concerned, they did not

consider Cole's conduct as a violation on his part of any of his obligations under the contract.

I think that Mr. Mayer won the case for Mr. Cole, even before Mr. Cole took the stand. And I pay my respects to Mr. Mayer for not only giving a forthright and truthful statement of the occurrences, but for allowing the jury to draw the only inference that could be drawn, and that is, that even after the appearance before the Committee, nobody thought Cole had done anything to violate the morality clause, or any other obligation under the contract.

It is inconceivable to me that a man of the long experience of Mr. Mayer would not have called to Mr. Cole's attention the morality clause, in that heart-to-heart talk that they had on the train when returning from Washington. I add that there was very little difference between the version of this talk given by Mr. Cole and that given by Mr. Mayer. I think there was only one instance in which they differed: Mr. Mayer was not certain whether, in speaking of the "shabby treatment", as he called it, that he had received, he also included some observation about the bad treatment that Mr. Cole had received, had said that he didn't like it and felt quite upset about it. Mr. Mayer said he did not remember making any [327] such observation, although he remembered making the statement that he resented the cavalier manner in which he was "brushed aside" by the Committee and was allowed to stand up and was not excused while another person was making a statement.

Mr. Mayer also set the pattern for this case in another respect, and that is this: that the most im-

portant thing in American business is faithfulness to the pledged word, that a contract is a contract, and that you cannot set aside a contract, except upon grounds that actually exist at the time action is taken. Mr. Mayer told the jury that when he heard that an oral promise had been made to Mr. Cole that his contract would be improved, he insisted that the company comply with the promise, although he knew that it was not in writing, and that you cannot modify a written agreement except by another agreement in writing.

III.

The Policy Behind the Notice

One other thing is quite apparent, and that is this: that MGM, the producing arm of the defendant, at no time, desired to take this action, that MGM, at no time, thought that the conduct of Mr. Cole gave them any excuse or warrant for suspending his employment or terminating it, and that they did not agree to the statement of policy except reluctantly and, even then, that they did not think that the statement of policy gave them the right to terminate this particular contract because no mention was made of it in the subsequent conversation [328] between Cole and Mayer. And, certainly, their action showed that they did not act on it until some one gave the opinion, no doubt, that the morality clause was a good ground for suspension in compliance with this declaration of policy.

One other thing is very significant to me, and that is this: The policy adopted was not the policy which MGM wished to adopt. It was the policy that Mr. Eric Johnston, President of the Motion Picture Association of America, sought to have adopted at the

meeting in July, 1947, and in which he was not successful. Mr. Mayer testified that at the meeting in July, Mr. Eric Johnston presented a three-point program, and that they did adopt the program, but not point two. This was the point that people who were charged with Communism should be discharged by the industry. Mr. Mayer, at that time, stated his opposition. He again repeated his opposition as Mr. E. J. Mannix, another executive, did when the agents or investigators of the Congressional Committee on Un-American Activities sought to have it achieved by insisting that certain writers, naming Cole by name, should be discharged. Mr. Mannix, as his testimony showed, used some very strong words in rejecting the suggestion. Mr. Mayer admitted that, while he did not use the language attributed to him by Mr. Mannix, that it expressed his sentiments.

So that we find this situation: that Mr. Eric Johnston sought, early in July, 1947, the adoption of a policy that would conform to the demand that this legislative committee [329] had made upon a private employer to discharge an employee who was bound to them by contract. He failed in that. At that time, no one had appeared before anybody; no one had brought themselves publicly into contempt, least of all, Mr. Cole. The Committee had already decided that they would force the industry to discharge certain men whom they considered suspect. Mr. Mayer said that he was not going to do that, that there was nothing subversive in any script that Mr. Cole had written, and that, so far as he was concerned, Mr. Cole's employment would continue. And Mr. Mannix concurred in that in less elegant language and prob-

ably less polished words than Mr. Mayer used under the circumstances. Nothing was done. And then we find that Cole's appearance before the Committee was discussed. At no time was any instruction given. At no time was there any intimation to Mr. Cole as to what he was to do. He went to Washington and used his own judgment. His employers knew that he had been subpoenaed. They knew that he had voluntarily accepted service of the subpoena in the barbershop of the studio, but at no time did they tell him, "You had better be careful as to what you say or do. You know we are dealing with a sensitive public." In other words, all the rationalization which Mr. Eric Johnston later on brought up was an afterthought which never existed in the minds of the executive directors of Loew's Incorporated. There is no need to refer to Mr. Johnston's testimony in detail. But he did not alter the complexion of the case. I am making this statement [330] so that counsel will understand that—I am not merely adopting the findings of the jury, because I do not concede that I am bound to adopt them in toto. Of course, if I felt the jury was unjustified in its conclusions upon the questions submitted to them, I would not wait until a motion for a new trial was made. On the contrary, under the declaratory judgment law (5), I would set it aside now. To me it is evident, as Mr. Johnston indicated, that it was his insistence, his high pressure methods which resulted in the adoption of this policy. When he made that statement, I was rather surprised that a man, who was in their employ, should have talked so contemptuously of the actions of the New York Committee as he did. He testified

that they were not getting anywhere; that there was too much argument. And he finally said that he was “sick and tired” of dealing with people who were so vacillating, and tired of their recalcitrance. Evidently he felt it was his duty to express his contempt or disdain that they were so vacillating. (6) And I think it was Mr. Mayer who testified that even then, the final assent was given reluctantly.

So we find this situation, that this notice does not contain or designate, in the language of the cases, a cause which, from the standpoint of the master, acting in good faith, is true. (7)

IV.

No Real Ground for Suspension

We are not dealing with that kind of ground. We are dealing with a ground which did not exist at any time from [331] July until the date of October 3rd, even “as a twinkle in the eye” of MGM, as a possible ground for discharge. That was put in by the resolution proposed by Mr. Johnston—a resolution which, so far as he was concerned, had its inception way back in July. In other words, Mr. Johnston, in July, had determined to accede to the request of the Un-American Activities Committee that certain persons, whom they considered suspect—among them Cole—should be discharged. He sought to achieve that in July by the statement of policy No. 2. He did not succeed. And then, when the hearings were held, he came back to the proposition and, in his dogmatic, doctrinarian manner, decided, in his opinion, that this conduct warranted acceding to the request that these men be discharged. In other words, if I were to use expres-

sions from philosophy, I would say that Mr. Mayer exhibited pragmatism while Mr. Johnston was dogmatic, doctrinarian and absolutist. Of course, we all know what pragmatism means. Mr. Mayer represented, to my mind, the better type of business executive, who believes in living and letting live. He believes that, so long as an employee complies with his contract, he is not going to tell him what to say, and that, regardless of what private opinions he may have, if he did not try to instill them into the pictures, it was not, so far as he was concerned, a ground for breaching the contract. And Mr. Mannix put the matter very emphatically when he said that Mr. Cole could not possibly put anything subversive in the pictures, and he challenged the investigators to show him any such matters. To put it differently, Mr. Mayer and Mr. Mannix took the [332] view that, if you had as an employee, a rake, so long as he kept away from your daughters and other members of your family, you would not discharge him. Mr. Johnston, on the contrary, is what we call in philosophy an absolutist. He does not believe that life is what we call in painting a chiaroscuro—a mixture of light and shadow. He believes that life is what Cotton Mather or Timothy Dwight thought it was. Mr. Johnston believes that the mere accusation that these men were Communists was sufficient to warrant ceasing their employment. He was not interested in and he didn't realize that, more important than that, is the sacredness of a contract, which the common law has respected, and a policy which is embodied in our Constitution, which contains a mandate that a person shall not be deprived of life, liberty or property

without due process of law (8), that a contract is property and that even a legislature cannot deprive a person of property without due process of law. For that reason, while he envisaged the possibility that legal difficulty might be encountered, he was willing to brush aside the contractual obligations of this defendant. What he wanted to achieve was a dogmatic declaration of policy and leave MGM to shift for itself in trying to find a legal excuse for breaking the contract.

Lest it be thought that I am not speaking from the book, I will give you the exact statement that the Reverend Timothy Dwight, President of Yale College, made about the Jefferson election. He said:

“We may see our wives and daughters the victims of legal prostitution; soberly dishonored, speciously [333] polluted; the outcasts of delicacy and virtue, the loathing of God and man.”

I am using that illustration not by way of comparison, but merely to illustrate that that dogmatic type of mind has existed in the United States for a long time. In the past, it was confined to a certain type of the clergy. But Mr. Johnston has demonstrated to me that it has reached the sacred precincts of business, and certain business men now have as dogmatic attitude towards the relations with the public and the effect of a person's conduct as that of these clerical men in our history. In English history, you can go back to Oliver Cromwell, and find that he almost gloated over the massacre at Drogheda, in 1649. And, even before that, to others. So, that this plaintiff was made to suffer the penalty not for an

act which his employer considered a ground for breach of contract, but for a dogmatic attitude on the part of an executive of the Association, who was of the opinion that his "doxy is the only orthodoxy and everybody else's doxy is heterodoxy".

The upshot of the whole matter is this. We are confronted with a situation which was induced by Mr. Johnston's conviction that men who profess certain heterodox ideas, regardless of contract, should be immediately discharged, as requested by the investigators—a policy which he sought to have adopted months before any act was committed by Mr. Cole, which he later succeeded in having adopted by the Association over the reluctant assent of Mr. Mayer and Mr. Mannix, the actual working [334] executives of MGM. And this resulted then in a condition whereby a wish entertained by Mr. Johnston over a period of months, unconnected with any particular act of this plaintiff, was transmuted into the resolution. And MGM was left in the position of having to retroject into the past this policy and to find a legal cause for breaching a contract and ridding themselves of an employee with whose services they had been entirely satisfied. Of course, they were within their legal rights to do so and use that as an excuse. But an American Jury has found that Mr. Louis B. Mayer was right and Mr. Eric Johnston was wrong, and that Loew's Incorporated was compelled to defend this lawsuit, not because its own executive directors felt that anything had been done to degrade the industry or degrade Cole, but because Mr. Eric Johnston, through his persuasion, insistence and dogged determination, had caused, over their

reluctant assent, the adoption of a certain policy. Placed in a position where they had to find a legal cause, the "dear old morality clause" was dug up and an effort was made to tie this matter to it.

That is the way I interpret the verdict of this jury. In what I have said, I do not wish to appear to be critical of Mr. Johnston. He is a man of distinguished achievements. He feels very certain of his position, and he certainly must have given satisfaction to his employers. All I mean to say is that I am satisfied, as the jury must have been, that MGM did not want this contract terminated, and, had the matter been left to their own judgment, they never would have done so. In sum, it was the act of Mr. Johnston and the New York Office, as Mr. Mayer said, which forced them to adopt a policy which an [335] American jury, with all the facts before them, now says was not ground for a suspension of the contract.

V.

A Precedent

Another observation to show that history repeats. Here is an anomolous position where an employee, who has given satisfaction, whom they actually want, and whom, if I understand counsel for the defendant right, even now they do not want to let go, so as to give him freedom to use his talents elsewhere—a man of that type was suspended and kept without a salary for over a year to satisfy, not a deep conviction of his employer, but a policy which the employer adopted, along with other employers in the industry. However, that is not new in the industry.

In March of 1929, I decided the Goudal case. There, an attempt was made to dismiss an employee, who had been entirely satisfactory, merely because she had hurt the ego of the director, Mr. Cecil B. DeMille, by saying "no" instead of "yes". Instead of discharging her when she dared say "no", Mr. DeMille kept her on for several weeks, until she had finished a picture, and then sought to discharge her. And the reaction of not only myself, but of the higher courts of California was identical with the reaction of the jury in this case. And that is what I said: (9)

"The anomolous situation in the case is this: Everyone, from president to director, has [336] nothing but praise for the artistry of the plaintiff. They do not complain of any general deficiency in the very pictures in which the disagreements were had. As to one, at least, the director said it was not only the best picture he had made, but the best 'he ever hoped to make', although he is still a young man. The estimates of the finished product by professional critics were of the same character. It was testified that no artist is so earnest about her work—so desirous of appearing to best advantage. This was the motivation of the suggestions that were made by her. Many of them, the very men who now testify to her temperamental deficiencies, admit they followed it. It was to her interest, as well as to the interest of the defendant, that she be at her best. The defendant was immediately interested. But she had an even greater stake—her entire future career. She was not a 'hack' actress, but an artist receiving what (even in theatrical circles) must be considered a very substantial remuneration, increasing each year. Her value lay,

one must assume, not in her ability to obey directions slavishly—for the humblest extra can do that—but in her ability to inject the force of her personality, experience and intelligence into the acting. And if she, having been employed with a view to her [337] known capabilities, could not have been compelled to perform parts of an inferior character, destructive of her artistic reputation, was she not within her rights in arguing about (or even objecting to) particular scenes, which did not give full scope to her artistic ability, or in endeavoring to have them changed, so as to show her to best advantage? We believe she was. There is no more personal art than the dramatic art; none that depends so much upon the whims of the public. A dramatic actress, of the stage or screen, may, by one false move, by one appearance in a play inferior in character to those of her previous repertoire, destroy and ruin her artistic reputation and see the effort of years turned to naught. Shall we say then that, when an actress of admitted ability, demurs to certain scenes in which she is required to act, and thereby causes some delay in the production of a motion picture, she is guilty of such disobedience as to justify her dismissal? We believe not. At any rate, not when, from the very beginning of her employment by the defendant, she was led to believe that her suggestions would be welcome, when such were asked, as appears from the undisputed testimony relating to the conversations which preceded the writing of the letters which are Exhibits 13, 14 and 15, (the latter dated June 21, 1927, and relating to the very [338] picture upon which most of the difficulties seem to center). Nor

when, in most instances, her objections being overruled, she performed as directed, and the play, as a whole, was accepted as praiseworthy by all, including the directors with whom the arguments were had."

And then I referred to another fact:

"Nor do we think that the delays in arriving on the set were of a character to justify the repudiation of her contract by the defendant. Some of these incidents occurred prior to the renewal of March 30, 1927. They should not, therefore, now, be given more weight than the defendant gave to them when, knowing of their occurrence, it made the renewal."

So the problem confronting us here is not entirely new. On the contrary, we have a precedent which was approved by the District Court of Appeal and by the Supreme Court of California. (10)

VI.

Conclusion

In saying what I have said, I am not to be understood as expressing any views as to whom a man may or may not employ. If an employer, consistently with the law, should enter into a contract, and insist that as a condition of employment, an employee shall wear a toupee, and afterwards discharges him because he did not [339] do so, I presume the employer could demand compliance. But in this case, I take this verdict of the jury to mean that, when a contract provides for the conditions of employment, the termination is governed by the conditions in the contract. And the verdict in this case means also that, whether

the motion picture industry has or has not the right to employ men who are Communists or accused of Communism, when they do employ a man and specify the grounds which govern the relationship between the parties, they cannot use, as a ground for discharge, a cause which was not thought of at any time by his employer, but which was forced upon the employer by a policy of the industry, adopted with reluctant assent. This is not to say that Loew's Incorporated does not have the right to bind itself to a course of conduct. It realize that motion picture making is a rather "touchy" business, and ever since they took a former cabinet officer, Mr. Will Hayes, and gave him the same position which Mr. Eric Johnston now occupies, they have had problems to meet, problems relating to the public's attitude. And they have a right to adopt any policy they choose, provided it does not violate the law. But when they have a contract, they cannot take a policy which was not in the minds of the parties when the contract was entered into or at the time an alleged act was committed, and then read it into the contract in order to make it a ground for the employee's discharge. This case presents a similar situation to that which arose in the Goudal case, in which I held—with the approval of the higher courts of California—that, assuming that Mr. Cecil DeMille, the director, had [340] the right to discharge Miss Goudal when she declined to act in a scene, they could not allow her to go on and finish the picture and then say, "Now, Mademoiselle, you are through now, and we discharge you because three weeks ago you dared say 'no' to Mr. DeMille." In effect, this is the lawsuit here, and

I so interpret the action of the jury. They saw, rightly, that that was the only problem involved—not Communism, not whether Mr. Cole was or was not a Communist.

I agree with their conclusion, and I have indicated why I accept it. In doing so, I am not expressing any philosophy other than the philosophy which I have expressed here, that, as a Judge, I must enforce the right of contract. Nor do I express any sympathy for or believe in the heterodox doctrine denounced by the Association of Producers. Anyone can go to my book on the Constitution (11) and to my recent article, “The Background of the American Bill of Rights”, (12) where I indicate why I consider Communism, Fascism, Naziism, Falangism, as all alike, i.e., totalitarian doctrines which are contrary not only to the letter, but also to the spirit of American life—doctrines which I disapprove and have always disapproved.

Dated this 20th day of December, 1948.

/s/ LEON R. YANKWICH,
Judge. [341]

NOTES TO TEXT

1. The questions and answers were:

(1) Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule?

Answer: No.

(2) Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community?

Answer: No.

(3) Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally?

Answer: No.

(4) Did the defendant Loew's Incorporated, by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him?

Answer: No.

2. The clause reads:

"5. The employee agrees to conduct himself with due regard [342] to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general."

3. The wording of this provision was:

"In the event of the failure, refusal or neglect of the employee to perform his required services or

observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If at the time of such failure, refusal or neglect, the employee shall have been instructed to render any of his required services hereunder, the producer shall have the right to refuse to pay the employee any compensation for and during the time which [343] would have been reasonably required to complete such services, or (should another person be engaged or instructed to perform such services) until the completion of such services by such other person, and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof."

Despite the protection which the power to suspend gave to the employer, the employee was forbidden to seek employment elsewhere in a clause which reads:

"During the period of any such suspension, refusal to pay or leave of absence the employee shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained."

5. 28 U.S.C., Secs. 2201, 2202; California Code of Civil Procedure, Secs. 1060, 1061. See, Yankwich, Declaratory Judgment under the New Rules of Civil Procedure, 1940, 1 F.R.D., 294 et seq.

6. His own version of his reaction to the opposition of some of the members of the Association, including the two executives of the defendant (Mayer and Mannix) at the New York meeting is very revealing: [344] "And, finally, a resolution was prepared that seemingly all present could agree to. Then Mr. Mannix spoke up and said that he didn't know whether this should be done or not because of the California labor laws, which might mean within the State of California that maybe this couldn't be done. Mr. Byrnes, our counsel, then spoke up and said that he had examined the California State Labor Laws and that, in his opinion, this was in no way a violation of the State Labor Laws of California. Mr. Russell, his assistant, also spoke on the same subject and I believe one or two of the other legal counsel present, who came from California, also spoke up to the same tenor. Then Mr. Goldwyn objected and said that he felt they shouldn't go ahead with it. I then arose and said that, in my opinion, these men would have to make up their minds—I think I used the expression, "they would have to fish or cut bait"—that I was sick and tired of presiding over a meeting where there was so much vacillation; but I had no authority to do anything; that I wasn't like the czar of baseball who discharged people if their conduct wasn't satisfactory and seemingly had that authority; but I had no such authority; that either they must adopt one or two of these other

alternatives, in my opinion, continue to employ men who were supposedly Communists and justify that employment in the eyes of the American public or they would have the other alternative and not employ them. But for goodness' sake, to make up their minds one way or another. [345] There was some discussion took place after that and finally it was agreed they would adopt this resolution, which was finally adopted. And the specific question was asked by me of Mr. Donald Nelson, who was a representative of the Society of Independent Producers, of which he was their president at that time, whether he agreed to this. He said he did. And I believe one gentleman asked Mr. Goldwyn if he agreed to it and I think someone asked Mr. Wanger if he did, and they did and they would go along.

“The Court: Did Mr. Mannix finally agree to it?”

“A. Mr. Mannix went along; yes. And I think with that the meeting adjourned for lunch, and we had lunch the second day. At that lunch we discussed means and methods of implementing this agreement by working with the Guilds in Hollywood, to elicit their help and cooperation. I mentioned that in previous testimony before the House Un-American Activities Committee I said that I felt that management and labor were responsible for cleaning their house of Communists; that that was a job for management and labor working together; that I personally believed that a Communist was a foreign agent and subversive, and that I personally wouldn't employ a Communist, a known Communist, because he was, in my opinion, a foreign agent, working for a foreign

government. I said I felt it was up to management and labor to work together as closely as they could on this problem; that this was [346] one of the things in which I felt that management and labor had a mutual responsibility to help solve. I think shortly after that the meeting adjourned and each went to their respective places."

7. *May v. New York Motion Picture Corp.*, 1920, 45 C.A. 396, 403-404; *Ehlers v. Langley & Michaels Co.*, 1925, 72 C.A. 214, 221; *Kiker v. Bank Sav. Life Ins. Co.*, 1933, 27 N.M. 346, 23 P(2) 366, 368; 56 C.J.S., Master and Servant, Secs. 41-44. As to what amounts to waiver, see, *Goold v. Singh*, 1928, 88 C.A. 339, 343; *Moresco v. Foppiano*, 1936, 7 Cal. (2) 242, 245.

8. U. S. Constitution, Amendments V and XIV.

9. Published in *Los Angeles Journal*, March 20, 1929.

10. *Goudal v. DeMille*, 1931, 118 C.A. 407.

11. *The Constitution and The Future*, 1935, revised in 1937.

12. Yankwich, *The Bankground of the American Bill of Rights*, 37 *Georgetown Law Journal*, pp. 1 et seq.

[Endorsed]: Filed Jan. 1, 1949. [347]

[Title of District Court ant Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendant Loew's Incorporated hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on December 30, 1948, in Judgment Book 54, page 775.

Dated January 27th, 1949.

IRVING M. WALKER,
HERMAN F. SELVIN,
LOEB and LOEB,

By /s/ HERMAN F. SELVIN,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 27, 1949. [348]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME FOR FILING RECORD ON APPEAL
AND FOR DOCKETING APPEAL PURSU-
ANT TO RULE 73(g)

Whereas the record of the proceedings of September 14, October 25 and November 30, 1948, herein has not as yet been transcribed by the court reporter; and

Whereas the extension of time hereinafter requested will terminate on a day prior to ninety days from the date of filing the notice of appeal, Now, Therefore,

It Is Hereby Stipulated that the time for filing the record on appeal and for docketing the appeal may be extended until and including April 8, 1949.

Dated March 2, 1948.

KENNY AND COHN,
CHARLES J. KATZ,
GALLAGHER, MARGOLIS,
McTERNAN & TYRE,

By /s/ ROBERT S. MORRIS, JR.

Attorneys for Plaintiff. [355]

IRVING M. WALKER,
HERMAN F. SELVIN,
LOEB AND LOEB,

By /s/ HERMAN F. SELVIN,

Attorneys for defendant.

It Is So Ordered.

Dated: March 2, 1949.

/s/ LEON R. YANKWICH,
District Judge. [356]

[Endorsed]: Filed March 2, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 356, inclusive, contained the original papers on removal as certified by the Clerk of the Superior Court of the State of California in and for the County of Los Angeles consisting of Complaint, Notice of Filing and Hearing Petition for Removal, Petition for Removal, Bond on Removal, Summons with proof of service thereon, Minute Order of February 2, 1948, granting petition for removal and Order for Removal; and the original Answer of Loew's Incorporated and Demand for Jury Trial; Notice of Motion for Judgment on the Pleadings; Application and Affidavit re Transfer of Cause; Notice of Hearing; Stipulation and Order re Application for Transfer; Opinion filed March 29, 1948, with affidavits of James M. Carter, Alice Scully, Albert Mellinkoff, Saoul Lourie, Helen Mellinkoff and David Mellinkoff; Order on Application for Disqualification and Transfer of Cause; Order on Motion for Judgment on the Pleadings; Pre-Trial Order; Notice of Motion for Judgment on the Pleadings; Requested Jury Instructions Refused by the Court and Forms of Special Verdict Proposed by Plaintiff and Defendant; Court's Instructions to Jury; Special Verdict; Defendant's Objections to Form of Proposed Findings of Fact and Conclusions of Law and Judgment; Ruling on Objections; Findings of Fact and Conclusions of Law;

Judgment; Notice of Entry of Judgment; Opinion filed January 11, 1949; Notice of Appeal; Supersedeas Bond and Bond for Costs on Appeal; Designation of Record on Appeal and Stipulation and Order Extending Time for Filing Record on Appeal and Docketing Appeal which, together with original Plaintiff's Exhibits in Evidence Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15 and original Defendant's Exhibits in Evidence B, C, and I and original Court's Exhibit 1 and original Plaintiff's Exhibits for Identification Nos. 11 and 12 and original Defendant's Exhibits for Identification A, D, E, F, F-1, F-2, F-3, F-4, G and H and original Reporter's Transcript of Proceedings on March 15, June 28, September 14, October 25, November 30, December 1, 8, 9, 10, 13, 14, 15, 16, 17 and 20, 1948, transmitted herewith constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30th day of March, A.D., 1949.

(Seal)

EDMUND L. SMITH,
Clerk.

In the District Court of the United States for the
Southern District of California,
Central Division

Honorable Leon R. Yankwich, Judge Presiding.

No. 8005-Y Civil

LESTER COLE,

Plaintiff,

vs.

LOEW'S INCORPORATED, etc., et al.,
Defendants.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances: For the Plaintiff: Kenny & Cohn, by Robert W. Kenny, Esq., Morris E. Cohn, Esq., Charles J. Katz, Esq., Gallagher, Margolis, McTernan & Tyre, by Ben Margolis, Esq. For the Defendants: Loeb & Loeb, by Herman F. Selvin, Esq., Milton Rudin, Esq. [1*]

Los Angeles, California

Monday, March 15, 1948—10:00 a.m.

Mr. Cohn: There was filed in this proceeding this morning a reply memorandum, which your Honor has not had a chance to see.

The Court: I saw the first memorandum. One thing you gentlemen overlooked, which was very important. I have read your memorandum. You cannot render a declaratory judgment on the pleadings. In

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

a declaratory judgment the Court has discretion, whether he shall render it or not, but it cannot be rendered on the pleadings. That is what you seem to have overlooked. I call your attention to an article in 1 Federal Rules Decisions, entitled: Declaratory Judgment under the New Rules of Civil Procedure, written by Leon R. Yankwich, Judge, United States District Court, and delivered before the Judicial Conference of the Ninth Circuit at San Francisco, California. It is a good article. I wrote it myself, not my law clerk, because I have none. On page 301 this statement appears:

“The granting of relief is discretionary. But the discretion is a judicial discretion. The Court cannot refuse to exercise it when facts warrant its exercise. This would constitute an abuse of discretion which, like other abuses of discretion, is reviewable.” [2]

It cites 92 Fed. 2d., 406, 4 Cir.; 103 Fed. 2d., 13, 7 Cir.; 102 Fed. 2d., 105.

How can you render a judgment on the pleadings in a matter which involves discretion?

Mr. Cohn: I admit that your Honor has the right to deny the motion on the ground that not enough appears from the pleadings to form the basis for the exercise of discretion. But the power does exist. Whether your Honor cares to exercise the power or not is a matter of judiscial discretion.

It is the position of the plaintiff, and the moving party, that enough appears from the pleadings to render judgment, if your Honor wants to exercise that power. Your Honor has the power to do so. I know your Honor has read the pleadings, but I would like to read from them, because I want to comment

on the notice of suspension, because that is the key document in the case.

* * * *

Without reading the contract in full, because that would take too long and is unnecessary——

The Court: I have read it.

Mr. Cohn: The suspensory provisions fall into three classifications: There is the right to suspend for disability or incapacity of the employee. There is the right to suspend for force majeure. Both of which are temporary in character. But the suspension that is not temporary in character is non-performance of the contract, for failure to perform. [5]

It is the position of the plaintiff that the failure which was referred to, and which would give the employer the right to suspend, is a failure which he can remedy. That is to say, if he is given an assignment, and refuses to work on it, if he does not report to work, he can be suspended, and the employer can terminate the contract so as not to be deprived of his services during that time.

The failure referred to here is not that kind of failure, because, in the first place, it does not lie within the defendant's power to terminate and suspend. In the second place it does not lie within the employer's right to cite these kind of conditions for termination or suspension. It is not within the plaintiff's power to purge himself of contempt. It is not within his power to acquit himself, and we insist it is not within the right of the employer to demand an oath concerning the party affiliations of an employee as a prerequisite to continuing employment.

The Court: That is not the point. You are not considering that as a breach of contract. You are merely asking a declaratory judgment.

Mr. Cohn: That's right.

The Court: A declaratory judgment is merely a declaration of rights. Therefore, unless you consider that a repudiation,—there are all sorts of matters, but there must be considered the question of whether he can be [6] employed by somebody else, what money he can earn, and so forth. I can't preemptorily order the defendant to employ the plaintiff.

Mr. Cohn: I think your Honor has stated the problem. Whether this notice of suspension is effective. We have two instruments before the Court. The only thing the plaintiff is interested in is whether or not the notice of suspension is effective.

The Court: Supposing it is not, I don't have to decide that. Why doesn't he sit back and do nothing, and then when the time is up sue for the money? This is a removal case. It was brought in the Superior Court. The defendant, because it was a foreign corporation, brought it into this Court. Therefore we are governed by the law of California.

Mr. Cohn: The reason is very practical as well as legal. This is a contract for exclusive services. The plaintiff is not in a position to go out and seek work. He is forbidden by contract to go out and work to earn a livelihood, or to seek work elsewhere. The position of the defendant—I don't want to use a strong adjective, but it is shocking—

The Court: You say it is shocking. They got frightened. They got cold feet. There is no question

about it. They got cold feet and were frightened by the Thomas [7] Committee. They don't need to re-employ him. Any judgment I will render here will be no good, because I cannot order the company to re-employ him.

Mr. Cohn: Your Honor can, in a declaratory relief judgment, assert and state those rights.

The Court: Suppose I do, what good will it do you?

Mr. Cohn: First, if your Honor can and will find the notice of suspension is ineffective. Second, if you find they are enjoined from asserting that ground of suspension; third, that plaintiff is entitled to have compliance provided by the terms of the contract. That is all we ask, because the plaintiff would not be in a position to wait idly, and wait for these years to go by until the termination of the contract. This is a case for declaratory relief judgment, and should appeal to the discretion of the Court.

The Court: If there were no issue of fact. But, as I read the answer, there are issues of fact. [8]

* * * *

Mr. Cohn: There is no issue, your Honor.

The Court: Under Subdivision 5 of your contract you say:

“The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule,”—They should use here obloquy—“or that will tend to shock, insult or offend the community or ridicule public

morals or decency, or prejudice producer or the motion picture, theatrical or radio industry in general.”

How could I decide, on a question of pleading, without any proof, whether his refusal to answer the question had that effect?

Mr. Cohn: Your Honor could decide, first of all, that it is not relevant to a determination of the right to suspend.

The Court: It is relevant, because it is the basis of the contract. If that is a condition of the contract, a breach would justify repudiation. Whether they took the wrong means is not material here.

Mr. Cohn: I think it is. That is because the right to suspend is a higher right than the right of termination. The right of termination exists by general law, but the right to suspend includes in it precluding plaintiff from going out and seeking employment elsewhere.

The right to suspend is an invention of later day employers to throttle the employee's opportunity for employment, and yet forbidding him to go elsewhere. That is written into the contract.

* * * *

We say if the right of suspension can actually exist, it would be inequitable and voidable, if the suspension provided for a defect which is not remedial, because the effect would be what we have here now: An employee of the defendant who cannot go to work for anybody, and cannot have compensation from his employer.

The Court: How about the words contained in lines 24 and 25, page 9, “observe any of his obliga-

tions hereunder to the full limit of his ability or as instructed''? Doesn't that cover a situation which lowers him in public esteem, as public esteem stands at the present time, with the Thomas Committee being sacrosanct. His obligation is not to do anything that will bring him into disrepute. And the motion picture industry, incidentally, was frightened. They got cold feet after first taking the view that they were going to allow free speech. I have read Drew Pearson. I know who did it. All of a sudden these men are brought into disrepute, and they have suspended them.

Mr. Cohn: We say, notwithstanding this language, the right to suspend cannot exist except for something that is temporary and remedial on the part of the plaintiff.

The Court: It is remedial, because he could have answered the question.

Mr. Cohn: It is not remedial now, because it speaks of a time subsequent. The terms laid down in the notice of suspension, as I have indicated, are either he must be purged or acquitted.

The Court: He could sign an affidavit with them, saying he is not a Communist.

Mr. Cohn: I don't think they have the right to require it under Section 2 of the Labor Code.

The Court: I think they have a right to do that. When divorce was not popular, twenty years ago, they would fire an artist who was given a divorce, because of the scandal. Now it just adds glamour, and the sooner they remarry the better. Take the case of

Mr. Durocher and Miss Davis. The pattern has changed.

Mr. Cohn: I think the pattern has been changed to include a provision which makes it a misdemeanor on the part of the employer to discharge, or threaten to discharge an employee by forcing him to follow, or refrain from following a course or line of political activity.

The Court: That is true. You can't prevent a man from voting. Let us take my Councilman, Ernest Debbs. He is employed by the Harvey Tool Company, an industrial plant. Supposing the Harvey Tool Company put in a provision in their contract that he is not to run for public office during employment. Do you think the Labor Code would make that illegal?

Mr. Cohn: I don't know. I think it might.

The Court: The Labor Code merely provides for situations which are not governed by contract. You can't require, for instance, that a man not divorce his wife. That would be illegal. A man has a right to run for public office, yet, if the man agrees with his employer that it would harm the employer to run for public office—I use Mr. Debbs as an illustration. He is employed by an industrial company as a public relations man—and supposing his contract provided that during the time of employment he should not run for office,—do you think that would not be a legal agreement?

Mr. Cohn: It might be. I don't know. If a man agrees not to run for office, because it is going to take his time and interest away from an employer, that is one situation. But if he were to be employed under a

contract which said that he must vote Republican, or should not join the Democratic party, that contract would be illegal.

* * * *

Mr. Selvin: I take it, your Honor, that the Court's remarks about the purposes by which the motion picture companies were guided in these matters were remarks made purely aliunde, in your discussion with counsel.

The Court: I am just stating what appeared in the press. I have no interest one way or another. I am only stating that originally they took the attitude of standing by the writers, and then changed their minds, and fired them.

Mr. Selvin: The record before your Honor indicates [16] nothing more than is stated in general terms in the notice of suspension.

The Court: We have a right, in discussing these matters, Mr. Selvin, to go to the public record too. All I stated was that it is a fact that Mr. Eric Johnston appeared and said he was standing behind these men. That they have a right to their own opinions. And then later on, after the committee hearings, they all of a sudden reversed their position and fired these men. Is that a correct statement of what took place?

Mr. Selvin: I can't answer that, your Honor.

The Court: Then you don't read the newspapers, Mr. Selvin.

Mr. Selvin: In that regard only, I don't read the newspapers.

The Court: I am trying to clear the atmosphere, to make this a simple lawsuit, to determine the legal questions.

Mr. Selvin: That is the only purpose we have. I don't desire to discuss it at this time, unless your Honor desires to hear me in connection with my argument in the memorandum.

The Court: I have read your memorandum. The only point before me is whether, on the basis of the complaint and answer, a judgment on the pleadings should be granted. I have already intimated to counsel that this being a declaratory judgment, it is very rarely that a declaratory judgment action is a matter upon which you can render a judgment on the pleadings.

Mr. Selvin: I certainly don't disagree with that statement at all.

The Court: I know you don't.

* * * *

Mr. Selvin: Let us suppose this case: Let us suppose a case where the picture industry is one which requires a very high degree of public acceptance and confidence. Let us suppose, by reason of the public activities of the employee, that public acceptance and confidence is strained or undermined or impaired, we have a different case in principle from one in which he cannot render either an eight hours day of service——

The Court: Why don't you terminate the contract? The answer to that is, to terminate the contract. You are forbidding him from gainful useful employment elsewhere. There is no issue of purging him of contempt. He can't go before the committee and say, "Yes, I will answer that question." As a

matter of fact, I don't think he declined to answer the question.

Mr. Selvin: He evaded answering it.

The Court: As a matter of fact, I don't think he declined to answer. There is no power on God's earth which says a committee can ask a man a question and insist on an answer of yes or no to the question.

Mr. Selvin: It is perfectly clear from the testimony of the particular plaintiff in this case that his complete answer to the question was that he would not answer.

The Court: No, it simply shows he said: "I will [21] answer in my own way." He never said, "I will not answer."

Mr. Selvin: Answering in his own way was, in effect, saying to the committee they had no right to ask the question.

The Court: Can you cite any rule of law which holds that a witness before a committee is compelled to answer yes or no?

Mr. Selvin: I realize that.

The Court: There is no such law.

Mr. Selvin: I know there is none. What I want to say in the first place, the committee—

The Court: I am not going outside of this record. I did go outside of the record in one instance, to make a general observation, which everybody knows, because it was a fact. But the record before the Court gives his entire testimony, and at no time did he say, "I will not answer that question."

Mr. Selvin: Suppose we concede, for the sake of

argument, the point, so far as the conduct is concerned, that it is not what he did before the committee, but the consequences of that conduct so far as the interests of the employer are concerned. There is a question of fact, whether those consequences occurred. In fact, for the purpose of this motion, it is conceded that these consequences occurred. There is no issue on that for the purpose of this motion. There is an issue on the case in that regard, but for the purpose of this motion it is expressly conceded, as a result of his conduct before the committee, he brought himself into public contempt and scorn, on all the specifications contained in the notice.

If he did that, the answer to why didn't we discharge him, instead of suspending him, is that we have the right, under the contract, to terminate or suspend. That we may exercise either right. Plaintiff contends we did not have that right. He was free to work elsewhere, if he wants to rest on his conduct or activities. He is in no different position than the defendant in that respect. Everyone must assume and take the risk of his acts, in the way he thinks is a proper interpretation of the contract.

If he thinks we have repudiated the contract, he has a right to act on that. If your Honor should determine on these facts that we did not have the right to suspend, but had the right to discharge, you can so declare that, and we can determine what, if any, action we shall take. [23]

* * * *

The Court: When a man is called before a Congressional Committee, he is asked certain questions.

The employer has nothing to do with that. The only question before the Court is whether the contract gave the right to suspend, and whether there is a factual matter before the Court. The question is whether the notice of suspension gave rise to a factual situation, or not, and my view of it is, that it does. The question is whether this conduct comes within the paragraph which says he shall not bring them into disrepute. That is for a jury to determine. Remember, the defendants have demanded a jury trial. I don't know that they are entitled to it. I haven't said that yet. They want a jury trial, and it is for the jury to determine whether they brought them into contempt. That is all there is. I am not talking about the wisdom of the thing at all. I am talking about the fact as to whether they have this right. [27]

* * * *

December 1, 1948—10 a.m.

Mr. Walker: Your Honor, counsel and ladies and gentlemen of the jury:

The purpose of this statement is not to make an argument to you on the merits of the case. It is to inform you of the contentions of the parties and to give you an outline of evidence which the defendant believes will support the defendant's contentions.

* * * *

[19]

It will appear that while he was acting for this defendant in a free lance capacity or on a week to week basis, that the contract which he had did not contain in it what you will hear referred to sometimes as the "morals clause"; that when he entered into a long-term contract with the defendant, there

was in that contract what you will hear referred to as the "morals clause". Now, that term is misleading.

The Court: In that instance, I think I will depart from the rule and I think I will ask you to read it so that the jury will know, because the questions to be propounded [21] to the jurors will be founded upon the wording of the clause. It is in your brief, on page 2 of your brief. It is easiest to read it from there, Mr. Walker.

Mr. Walker: I have it right here in a copy of the contract, your Honor.

The Court: That is all right. Go ahead and read it.

Mr. Walker: I first would like to say this to you, however, I think you will observe the appropriateness of the remark when I read the clause, that while it has been referred to and you will hear it referred to as the "morals clause", it would in my opinion at least be much more appropriately designated as a public relations clause. The clause in the contract between Mr. Cole and the defendant and which will have great significance—

The Court: "Public conventions". You call it "public relations", but under the wording itself it is called "public conventions and public morals" clause. Go ahead. The name you called it doesn't matter, but the phrase is "public conventions and morals" clause.

I wouldn't sanction the adoption of the word public relations instead of "public conventions", because "public conventions" has a definite meaning, while "public relations" may relate to a press agent, to anything. Every press agent of the country calls himself an authority on public relations, and this is

not a press agent clause. This is [22] a morals clause relating to public morals and its acts which may shock public conventions.

Mr. Walker: May I read it to the jury?

The Court: That is all right.

Mr. Walker: And they may characterize it as they see fit.

The Court: That is all right. I do not want the jury to receive the impression that this clause is at any time known as "public relations clause." It is designated and referred to as "public conventions and morals" and not "public relations". You may call it public relations—

Mr. Walker: Your Honor, I would like to state that according to my information—

The Court: Yes.

Mr. Walker: —and as I think will appear in the course of the evidence, this clause is never referred to as the "public conventions clause."

The Court: As what, as "public morals".

Mr. Walker: It is sometimes spoken of as the "morals clause".

The Court: That is right.

Mr. Walker: And it is sometimes spoken of as the "public relations clause".

The Court: All right.

Mr. Walker: But it is never spoken of as the "public [23] conventions clause."

The Court: All right. If the clause you use, "public relations clause" is one by which it is ever referred to, you may show it. Go ahead.

Mr. Walker: However, as I say, without regard

to any special characterization, here is the clause itself—

The Court: That is right.

* * * *

[24]

Mr. Walker:

Now you are going to hear references to some of the people who testified back in Washington before the Committee. [30] Some of them are going to be designated as unfriendly witnesses and some as friendly witnesses. I am not attempting to give you any particular definition of what that means, beyond the fact that I think it will appear that the people who were friendly witnesses were the people who gave testimony willingly before the Committee, and the people who were designated as unfriendly witnesses did not willingly give their testimony before the Committee or freely give testimony before the Committee.

You will hear references to the 10 men, 10 of the persons who were referred to as unfriendly witnesses. Those persons, with two exceptions, were all writers for the motion picture industry. One of those people designated as the 10 men was the plaintiff in this case, Mr. Lester Cole.

I am going to give you the names of the other nine.

The Court: I don't think it should be done at the present time.

Mr. Walker: All right, I shall omit it, at the court's suggestion.

The Court: The only difference of "friendly witnesses" or "unfriendly" is insofar as it relates to him, whether he was called that or was in fact unfriendly. I want to say, however, that a person being designated as such does not characterize him as such. I am not challenging the statement, because it is

merely descriptive. It is for you to determine what the testimony he gave—what the [31] character of the testimony was. And neither the names nor what they did is material at the present time. Go ahead.

Mr. Walker: The hearing opened on October 20, 1947. It was designated, as had been the former closed hearing in Hollywood, as An Investigation of the Infiltration of Communism in the Motion Picture Industry.

During the first week, testimony was given by what we have called the friendly witnesses and was given by a number of executives of companies such as the defendant here and was given by other persons whom I will not at this time enumerate.

The Court: I will say this, Mr. Walker, so there will be no misunderstanding: You will remember that upon the questions suggested by the plaintiff to be asked of the jury were the names of certain attorneys not connected with this case and, at your suggestion and at your insistence, those names were not brought to the attention of the jury. For the same reason, I say the question of other witnesses' names should not be brought to the jury, because if the names of the other witnesses are brought before the jury, then, the names of the attorneys who were mentioned in that statement should also have been brought to the jury, so I am being consistent by following the pattern. [32]

Mr. Walker: I have not any desire to go into the names of the different witnesses at this time.

The Court: It is not material, because otherwise the jury should have been examined as to their names and their acquaintances and I would have asked them

if they knew anything of those persons and whether any of their actions might influence them; in other words, my examination of the jury would have changed entirely had it been my understanding that in this case we can go into those collateral issues, and you at least implied you agreed with me by objecting that the only persons whose names should appear are those connected with this particular case, even objecting to the names of the attorneys.

Mr. Walker: I would like to say to your Honor, with all respect, that my recollection is that it was at your Honor's own instance that no questions were asked in regard to the knowledge of attorneys outside of this group.

The Court: No, no. We discussed it in chambers, the question, and the objection was made either by you or the others, that we would not go into the names of the attorneys except the attorneys appearing in this case.

Mr. Walker: I think it is unimportant except for the fact that I would like to record my recollection that I made no such objections.

The Court: Well, the objection came on your part.

Mr. Walker: No, no. I would like to record my impression [33] and my recollection that no such objection was made by Mr. Selvin or myself.

The Court: All right. Then, I will take the responsibility, I will take the responsibility and hold that I declined to examine jurors as to the names of other attorneys [33-a] connected with other phases of the investigation upon the ground that I did not believe they were in the case at the present time. I

do not believe the names of any witnesses should be made, that are friendly or unfriendly, and I shall take the responsibility, and relieve you of any inference that you stipulated or agreed to it.

Mr. Walker: Yes.

The Court: I do it of my own accord.

Mr. Walker: I shall be very happy to refrain—

The Court: Yes. I may state to the jury that it is my duty as a judge to keep away from the case any matters which I do not think are material, and if, in the course of this trial I should do so, even though there be no objection on the other side, it is within my power to do so. In other words, counsel may agree among themselves that a certain matter shall not go before the jury, but I have to decide whether it should at the time, and I may decline to allow it to go before the jury, even if they do. In other words, I am charged with a responsibility under the Constitution to conduct this case and keep away from the jury, and from myself also, because there was a phase of the case presented to me outside of your hearing, matters I thought under the law were not material to the case, and if either side is dissatisfied with what I do they have an exception automatically under the law. [34]

Mr. Walker: Your Honor does recall that Mr. Katz spoke at some length with reference to statements and advertisements made by and put into the papers by Mr. Eric Johnston.

The Court: That is right.

Mr Walker: Who is not, of course, an officer of this defendant corporation.

The Court: I am not thinking at the present time

that these are material. I will rule on them at the proper time. But if permissible, under the assumption that you may claim, as the wording of the "morals clause" says, that the conduct is injurious, not only to yourself, but to the industry, and therefore the action taken by responsible heads of the industry, such as Mr. Johnston, who speaks for the industry, not only here but abroad, who sees the Pope, and other heads, on behalf of the industry, then the proof to that extent becomes material. So I am not talking about materiality. I am really trying to keep out for the present, things that are not material.

Ladies and gentlemen of the jury, I want to make this statement, that anything I may say, in discussing problems with counsel, is not to be taken as evidence. You cannot take anything I say as evidence, any more than you can the statements of counsel as evidence, the only evidence that goes before you is that presented in open court, as I [35] stated to you yesterday, by witnesses who are sworn, or by documents the court allows in. You are not to take as indicative, anything I may say, as my judgment on the facts. And you are not to form any impression from any questions I may ask or statements I may make, that I have an opinion as to a particular fact in the case. If you have such an impression, you have a perfect right to disregard it, if it does not conform to your impression of the particular fact.

I give this instruction generally at the end of the case, but in this case, as it is going on for several days, I think I had better give it to you now so that you will understand that what I say in these discus-

sions between counsel and the court, is not evidence.

You will notice that I interrupted Mr. Katz, and I am doing the same thing to Mr. Walker, in the belief that the issues, so far as the opening statement is concerned, should be narrowed down to things we know now, or which are likely to come up. If other matters which I do not think are material now, should prove to be material during the course of the trial, then they may be brought in at the proper time.

This statement does not limit counsel to things they say they are going to prove. This applies to both sides. Is there any other further warning? I notice Mr. Selvin is getting anxious, and was whispering to Mr. Walker. I [36] will do it in any language you want.

Mr. Selvin: No, your Honor, I am just making an observation to Mr. Walker who is associate counsel, which as associate counsel I think I have a right to make.

The Court: Yes. But I just wanted to give you the privilege of telling me directly anything that may come to your attention.

Mr. Walker: Inasmuch as you told us yesterday that we should only be entitled to have one counsel at a time—

The Court: That will not apply to the opening statement, because when a person makes an opening statement, or one of the attorneys makes an argument, an attorney may have some questions to ask him. I will not draw the line as tightly as that. I do not say this in criticism at all. I am very anxious, in the trial of the case with the jury, that the jury should know, that under the Federal practice, in the Federal

Court, where the judge has a right to comment, it is not the custom of the judges of this court to exercise that right, and I so instruct them. I have a special instruction to that effect, which I will give at the end of the case. And I am not going to do it in this case, unless that situation should arise. In my entire career on the bench, of 14 years, I have commented only once on the facts, to the jury. I want the jury to know at the start, that nothing that I have said is to be taken as evidence. I will [37] confine myself to statements that are necessary in the discussion of legal questions, because it is not possible, every time counsel wants to object, to tell the jury to stop their ears; so I want to make sure that nothing I say is to be taken by them as indicative of the facts. All right.

Mr. Walker: I would like to say that it is quite possible—

The Court: Let me go further than that. I am going to ask you to disregard any statement I made about Mr. Johnston being a representative of the motion picture industry, and seeing potentates, and so forth. I am going to ask you to disregard that. That may not be brought out before you, and may not be material, but I think counsel will agree that Mr. Johnston speaks for the industry at various times. Is that correct? [38]

Mr. Walker: I will say to you, in response to the court's question, that there is an organization known as the Motion Picture Association of America, one of the functions of which is to obtain and communicate to its various members information in regard to public opinion. One of its functions, through

its president, Mr. Eric Johnston, is to advise the members of the Motion Picture Association of America, of whom this defendant is one, of things that are necessary in the judgment of Mr. Johnston for the motion picture industry to do, or to leave undone, having such regard with what Mr. Johnston believes is public opinion.

Mr. Katz, in his opening statement, told you about an advertisement published in the papers, that carried Mr. Johnston's name. The court indicated, although Mr. Katz wanted to read the advertisement, that it should not be read at this time. So Mr. Katz then purports to summarize the statements in the advertisement for you, and without going into detail with regard to it, I would like to say to you that the advertisement will be before you, and you will have an opportunity to hear for yourself what it did say.

I would like to make it clear that it is not the contention that the advertisement consists solely of statements made by Mr. Johnston of the procedure followed by the Committee, and I am referring now to that Committee on Un-American Activities, heretofore referred to. Mr. Katz told you, if I recall correctly, that Mr. Johnston said in this advertisement that the committee was seeking to "smear" the industry and establish control over the screen. I am quite sure, when the advertisement is before you, that you will find that it is confined to a criticism of the procedure of the committee.

On the 20th—I am sorry if the necessary colloquy between court and myself interrupted the sequence of

events—I want to bring you back to the fact that the hearing began on the 20th of October, and that there was testimony by various people, none of whom fall into the classification of “unfriendly witnesses.” But in the course of that testimony statements were made—and I am not seeking to indicate to you that the statements are intitled to weight or are not entitled to weight—but statements were made before the committee by various persons to the effect that the plaintiff here was a Communist, and that certain other people were.

Great publicity was given, through all the ordinary media of this hearing, as to what the various people testified, and the newspapers dealt with it entirely as news items.

Radio commentators spoke of it, and there was testimony and great publicity in regard to what was occurring at these hearings, and in regard to the infiltration of Communism in the motion picture industry. [40]

To sum it up, there was great publicity in regard to what was occurring at this hearing and in regard to this investigation of the infiltration of Communism into the motion picture industry, before any of the 10 men took the witness stand. Beginning on October 27th, the first of the 10 men took the witness stand and all of them except Mr. Cole, I believe, testified during the days beginning with the 27th and running through to the 30th of October.

The publicity in regard to the testimony of these men, classified as the “10 men,” and before Mr. Cole took the witness stand, through these media that I

have referred to, newspapers, radio and so on, was very great. I think it will appear that Mr. Cole knew that this was the case at the time that he took the witness stand. On October 30th, he was called to the witness stand. The testimony of Mr. Cole will be presented to you in full during the course of this trial. Amongst other things, he was asked two questions. He was asked, "Are you a member of the Screen Writers Guild?" and I should tell you that the Screen Writers Guild is a guild or union of the writers, or a large portion of the writers, engaged as writers in the moving picture industry. As I say, he was asked the question, "Are you or are you not a member of the Screen Writers Guild?"

I shan't say to you at this time that Mr. Cole refused to answer the question but I will say to you that at the completion of his examination the Committee was not informed as to whether or not he was a member of the Screen Writers Guild.

The Court: I think that is a very, very fair summary and I think you are to be congratulated on your statement. I think that is a very good summary. It avoids characterizing it as failure or refusal. All right; you may proceed.

Mr. Walker: I may use characterizations at a later time but not at this time.

The Court: That is all right but I wanted to pay you a compliment at the time. It was coming to you.

Mr. Walker: During the course of the examination of Mr. Cole before this Committee of Congress, he was asked the question, "Are you now or have you ever been a member of the Communist Party?"

And, again, without any characterization, I will say that, when Mr. Cole's testimony before the Committee was completed, the Committee was not informed as to whether Mr. Cole was or was not a member of the Communist Party. Mr. Cole's testimony, as had been the case with the other 10 who preceded him, received great publicity. After he had completed the testimony and after the hearing had terminated, as it did on October 30th, but with an indication that it would be continued at a later date and that other people connected with the moving picture industry would be called before it, the comment and publicity with reference to the situation continued all through the period down through November and to December 2nd. There was great publicity as to what had occurred at this hearing and comments, editorial comments, with reference to the significance or lack of significance of the things which had transpired at the hearing. It will appear in evidence that it was a matter much discussed between persons during this period. On December 2nd, as you have been told, a notice was given to Mr. Cole advising him that his employment and his compensation was terminated, or I mean was suspended, until such time—I should interrupt myself to say that in the meantime Mr. Cole had been cited for contempt of Congress and he had been indicted.

Mr. Margolis: That is not so.

Mr. Walker: Let's not quarrel about words—a proceeding, a criminal proceeding, against him had been instituted, seeking to punish him for contempt of Congress. So that, on December 2, 1947, he was

given this notice and the exact wording of it will be before you in the course of the trial, in which he was advised that he was suspended. And, let us say that he was suspended, and I think this is a proper paraphrasing of it, until such time as he had been acquitted of the charge of contempt or had purged himself of the contempt of Congress and had taken an oath that he was not a Communist.

It is the contention of the plaintiff in this action, which is, as the court has told you, a special form of action—it is, in effect, his contention that the court should declare that the action taken by the defendant was wrong, was unjustified, and that Mr. Cole is entitled to his salary from December 2, 1947, down to the present time and, in effect, that he is entitled to his salary for the balance of the term, existing term, of his contract.

It is the contention of the defendant that, by reason of his conduct before the Congressional Committee, Mr. Cole failed in his obligations under his contract, more particularly, that he failed in his obligations under his contract by reason of the provisions of Paragraph 5, which I read, in that his conduct before the Committee, and I refer to all of his conduct before the Committee and in connection with these hearings, or this hearing, before the Committee, shocked and offended the community; that his conduct brought him into scorn and contempt of a substantial portion of the people of this country; that his conduct was such that it prejudiced his employer, Loew's Incorporated, and the motion pic-

ture industry generally. I would not be giving you a complete statement of the position of the defendant here did I not tell you that that contention of the defendant is based, in part and in substantial part, upon the fact, as the defendant contends it to be, that the public, or at least a substantial part of the public, were led to believe, by the manner in which Mr. Cole conducted himself and the manner in which he [44] dealt with the question, "Are you now or have you ever been a member of the Communist Party"—

The Court: That shouldn't be brought in at this time. That is an argument to be made after the evidence is in, because it is not a question as to which proof will be directed with any certainty.

Mr. Walker: Your Honor, I shall—

The Court: In fact, I am going to tell the jury so they will understand it, while you are permitted to state what the contentions are, they are not to determine that. The only thing they are to determine is a specific question and, when you are through, I will tell them in a general way what the question is going to be, in accordance with the instruction I am likely to give, not in the same words.

Mr. Walker: If I may anticipate the court—

The Court: Leave that to me. I don't want to break into your statement. They are going to be called upon to determine whether this conduct had the effect claimed in the morals clause, the effect condemned in the morals clause. They are not going to be asked to determine why it had that effect. That is a question of argument on the basis of any evidence produced in the record. In other words, you may state

your ultimate conclusion of the facts on which you base it, but what you started to say is an argument and I don't want it to go any further than that. That is all. Your position [45] is a question of fact. The reasoning by which you argue the position is argument and, therefore, has no place in an opening statement. Do you see the point?

Mr. Walker: I may argue that with the court at another time but not at this time.

The Court: You can argue it to the jury later on to your heart's content, at the proper time, but I say arguments have no place in an opening statement.

Mr. Walker: And I say an argument has no place in an opening statement.

The Court: My interruption is not to be considered a criticism of counsel. As a matter of fact, ladies and gentlemen, I want you to know that counsel have a perfect right to object to any statement that I may make, right in open court, in your presence, and ask me to instruct you to disregard it, because in the course of the trial the court may make a statement unconsciously that might be misinterpreted. So that in interrupting Mr. Walker and making the statement I did, it was merely my object to indicate that the line of statements he was making should not be pursued because they are in the realm of argument. I am not striking or asking you to disregard anything he said. I am merely warning him. Go ahead.

* * * *

[46]

Mr. Margolis: If the court please, and ladies and gentlemen of the jury, we desire to call as our

(Deposition of E. T. Mannix.)

first witness Mr. E. J. Mannix. It so happens that Mr. Mannix is unavailable at this time but we have, prior to the trial, taken his deposition. We propose, therefore, at this time to read into the record portions of the deposition of Mr. Mannix taken prior to this trial. [62]

* * * *

(The following questions were read by Mr. Margolis, and the following answers were read by Mr. Kenny:)

“Q. You are an employee, are you not, of Loew’s Incorporated? A. Yes.

“Q. In what capacity?

“A. I am vice-president and general manager.

“Q. How long have you held that position?

“A. Approximately 20 years.

“Q. I wonder if you would mind telling us briefly the general nature of your duties and responsibilities as such.

“A. Well, I am in charge of general operations of the plant with approval of the board of directors and the president of the company. The functions of the general manager of a motion picture studio are very, very complex and I don’t think you would want to go into detail of what I do and what I don’t do. I assign certain responsibilities to other members of the organization to carry on. We have an assistant general manager, a studio manager, production manager, down the line, who are given authority to function. The final approval, in case of dispute or any hesitancy on their part of decision, is referred to me.

(Deposition of E. T. Mannix.)

"Q. You, in other words, have the final word on policy? Does that include matters relating to hiring and firing?

"A. I have not the final word on policy. [66]

"Q. The final word is with the board of directors, is it?

"A. The board of directors and the president of the company.

"Q. I see, but what are your duties and responsibilities as far as the hiring and firing of personnel for the company are concerned?

"A. I think we should divide that into several categories, Mr. Margolis, because the hiring and firing of people on the backyard of the production of the motion pictures, although I have the responsibility and authority, I never exercise it. It is exercised by other men in the organization.

"Q. I am primarily concerned about the situation as far as writers and talent personnel is concerned.

"A. I repeat that I have the authority to hire and discharge, but I do not exercise that authority at all times.

"Q. Are questions of hiring and firing the more important personnel in the artists talent group cleared with you?

"A. You see, a lot of our business people are hired for a limited period. They have a definite assignment, and when that is complete it is automatic. They are relieved of their responsibilities to the company. Their job is finished.

"Q. All right. Loew's Incorporated is a member both of the Association of Motion Picture Producers

(Deposition of E. T. Mannix.)

and of the Motion Picture Association of America, is it not? [67]

“A. I believe that is right. It is confusing to me as well as you.

“Q. But there are the Eastern and Western—

“It is the Eastern and Western organization.

“Q. And Loew’s, Incorporated, is a member of both of those organizations?

“A. I believe they are.

“Q. Do you have any responsibilities as an employee and officer of Loew’s Incorporated, in connection with representing it on either of these associations? A. At the present time, no.

“Q. Have you had in the past? A. Yes.

“Q. During what period?

“A. Well, I should say approximately 10 years.

“Q. Ten years ago, you mean?

“A. Up to within the year. I believe in January or February of this year, I resigned as a member of the board of the Western Association.

“Q. That would be the association of the Motion Picture Producers, would it not, Mr. Mannix?

“A. Yes.

“Q. You attended the meetings of the Western Association as a representative of Loew’s, Incorporated, generally speaking, is that right? [68]

“A. Generally speaking.

“Q. Now, does that association have regular meetings?

“A. Well, the by-laws provide for a monthly meeting.

(Deposition of E. T. Mannix.)

“Q. By the way, do you happen to have a copy of the by-laws of the organization?

“A. Do I have?

“Q. Yes.

“A. I may have a copy at the office. I don't recall reading the by-laws for many, many years.

“Q. I assume that the organization had both regular and special meetings. Is that right?

“A. Yes.

“Q. Were minutes kept of the meetings?

“A. In most instances I believe they were, particularly of the regular meetings, the minutes were kept.

“Q. How about special meetings?

“A. I don't know whether minutes were kept of the special meetings or not. [69]

“Q. Were copies of these minutes sent to the member organizations? A. No, sir.

“Q. Just kept in the office of the Association. Is that correct? A. That is correct.

“Q. How long have you been in the motion picture, the production end of the motion picture industry altogether?

“A. I started in the picture business in 1916.

“Q. 1916? A. Yes.

“Q. You are pretty generally familiar with how motion pictures are made in Hollywood here?

“A. I believe I am.

“Q. In your experience, by whom is the content of motion pictures controlled? By that I mean, is it controlled by the executives in the studios, by the writers, by the actors?

(Deposition of E. T. Mannix.)

“A. By content, what do you mean?

“Q. Well, policy matters as to the type of things that should go into a picture?

“A. You mean the stories themselves?

“Q. Stories, subject matter.

“A. The subject matter is controlled by the studio office in charge of production. [70]

“Q. (By Mr. Margolis): Who are in that office?

“A. Mr. Mayer is in charge of production at the studio.

“Q. I see, and he has a kind of council?

“A. That is right.

“Q. Is that the group you were talking about?

“A. No, I was speaking about Mr. Mayer. You asked who had the authority. He is the man with the authority to say yes or no. Now that he does have a council, they only advise with him, but he still has full authority to decide on policy and content of pictures.

“Q. (By Mr. Margolis): In your experience in the motion picture industry, have you found anything either in scripts or in the motion pictures with *which* you have been familiar, which you believe was improper, didn't belong properly in such scripts from a political standpoint?

“A. Mr. Margolis, you are confining that to pictures made by our company?

“Q. I will confine it in the first instance to pictures with which you have been personally familiar.

“A. I personally asked the question. That

(Deposition of E. T. Mannix.)

wouldn't include pictures I have seen that were made in Europe or made outside of the United States of America.

"Q. I am not concerned with pictures made outside of the United States of America.

"A. The question was all pictures you had seen. [71]

"Q. Let me ask you the same question limiting it to your company and limiting to the United States of America and unless it is a picture made by your company in Mexico or some other place, I would include those.

"A. No, I don't recall any picture that our company made that was improper politically.

"Q. Are you generally familiar with motion pictures or have you seen over this period of time motion pictures made by other companies?

"A. I have seen a number of pictures, Mr. Margolis.

"Q. Part of your responsibility is to be generally familiar with what is going on in the motion picture industry. Isn't that so? A. Yes.

"Q. And what you have seen and observed in other companies, if I would ask you the same question about pictures made by other companies, other American companies, would your answer be the same?

"A. I would answer generally I have seen nothing in motion pictures that I consider political.

"Q. You are acquainted with Lester Cole, are you not? A. Yes, sir.

(Deposition of E. T. Mannix.)

“A. To the best of my recollection, Lester Cole joined our organization some two, two and a half years ago, maybe [72] three years.

“Q. I see.

“A. It is since the association with our company that I know him.

“Q. He was during the period of two and a half or three years at least—

“A. Mr. Margolis, may I correct that. I met Lester Cole, I am quite sure when he was a member of the negotiating committee for the Screen Writers Guild and that may go back six or seven or eight years. Is that right? That is when I first met Mr. Cole. That was merely an acquaintanceship. He sat across the table from me in the negotiations.

“Q. Then you became better acquainted with him about two and a half or three years ago when he became an employee of Loew's, Incorporated. Is that correct?

“A. On a little more familiar speaking basis. It was nothing intimate in our acquaintanceship ever. It was a business relationship.”

“Mr. Margolis: I think, if I may interrupt at this point, that because of date problem, I will state to the jury that this deposition was taken March 31, 1948, and therefore, when Mannix referred to a period two and a half or three years ago and when the questions referred to a period of two and a half or three years ago, the reference

(Deposition of E. T. Mannix.)

was two and a half or three years before March 31, 1948. [73] Now, we may go on:

“Q. I understand, but you got to know him and his work because of the fact——

“A. I know his work.

“Q. During the time that Mr. Cole was employed by Loew's, Incorporated, he was employed under contract, was he not? A. Yes.

“Q. Did you have anything to do with the negotiation of the contract or contracts under which Mr. Cole worked?

“A. I passed on them only.

“Q. You did not participate?

“A. No, I did not participate in the negotiations.

“Q. Do you remember whether Mr. Cole had more than one contract with Loew's while he was working there?

“A. It would be hard for me to say whether he came there on a freelance basis originally and then entered into a contract, or came on a short-term basis and then a longer contract. I know he had a contract for two or three years and I think that we had a total period of five years.

“Q. Are you familiar with the adjustments which were made in Mr. Cole's contract in 1947?

“A. I am not familiar that I could go into details. I know there was some adjustment made in his contract in '47.

“Q. At that time, his contract still had a number of [74] years to run, did it not?

(Deposition of E. T. Mannix.)

“A. At the time of the adjustment I believe the option was due in October.

“Q. And the option?

“A. It was either due in October or due—it was due, the adjustment was made several weeks before the option date was due.

“Q. The company had an option which it could have taken up without making any adjustment in the contract other than that which was called for in the option itself which was an automatic increase per week. Isn't that so?

“A. You would want everything that led up to what caused the adjustment?

“Q. I would be very interested in having that.

“A. That would take a lot of time to go in and I will cut through it very briefly that there was, and you know—there is always pressure by a man or his agent of getting more money. The pressure was put on us strongly. The work that Lester had done up to the time was quite satisfactory. His salary was not increased at this adjustment period.

“There was a rearrangement of a vacation which he was paid for, a six weeks' vacation. I am quoting from memory. You have the record. I think there was a six weeks' vacation. He was to have twelve weeks off a year, six was to be paid for and six not to be paid for. I think the weekly salary [75] was not adjusted at all.

“Q. I think that is correct.

“A. If my memory serves me correctly.

“Q. Now, this adjustment was made, was it not,

(Deposition of E. T. Mannix.)

because Mr. Cole's work was satisfactory, and you felt that he was entitled to this adjustment?

"A. Yes, sir. I didn't hear what you said.

"Q. You felt that he was entitled to this adjustment, it was reasonable?

"A. We wouldn't have given it to him unless we thought it was reasonable.

"Q. Did you have any conversations with Mr. Cole at the time or prior to the time that this adjustment was made concerning it?

"A. No, sir.

"Q. You merely approved the adjustment after it was negotiated. Is that correct?

"A. Now, I don't believe that I had any discussion with Lester Cole prior to this. It is awful difficult of all the people you see and all the writers you see so often, whether or not Lester didn't say something to me—I know I made no decision with Lester what was to be done, and I don't even recall that he spoke to me about it. I am sure he did not. I approved the adjustment when it was brought in to me.

"Q. During the time that Mr. Cole was employed by [76] Loew's, and except for what you may have complained of in connection with Mr. Cole's conduct before the House Un-American Activities Committee when he testified there in October, 1947, were Mr. Cole's services at all times satisfactory? A. I presume they were.

"Q. As far as you know?

"A. As far as I know.

(Deposition of E. T. Mannix.)

“Q. Aside from the question of Mr. Cole’s conduct before the House Committee, do you know of any particular at all in which Loew’s, Incorporated, complained of or had any complaint against Mr. Cole with respect to the manner in which he performed his work or his obligations under his contract with the studio?

“A. I don’t recall any.

“Q. As far as you know there were none. Is that correct? A. As far as I know.

“Q. Was it customary when work of top paid writers was unsatisfactory, or it was complained to have violated their contract, to have called such matters to your attention?

“A. Mr. Margolis, are you asking me of all the work that he had done prior to this date that you mentioned was satisfactory, or his conduct was satisfactory?

“Q. I am asking as to both. [77]

“A. Well, I can’t answer for the work, and it is an unfair question, because a man brings in—the writer brings in many, many stories, parts of stories that are unsatisfactory.

Now, I don’t want to make the statement that it was unsatisfactory. There were times when the work was unsatisfactory, and there were times when it was satisfactory.

“Q. That is true of every writer?

“A. That is right.

“Q. But I mean his work as a writer, his work as a writer was satisfactory as a writer. There

(Deposition of E. T. Mannix.)

were other times no. Now, let's take the whole picture. I would say that his general work as a writer was satisfactory.

"Q. As a matter of fact, he was considered to have done some very fine work for the studio. Is that not so?

"Mr. Selvin: Considered by whom?

"Q. (By Mr. Margolis): By the studio, by yourself?

"A. Well, there is degrees of what is fine and what is not fine. His pictures speak for themselves. He wrote 'Fiesta.' He wrote 'Romance of Rosy Ridge.' He wrote 'High Wall.'

"Those are the three pictures that I recall that he had quite a lot to do with. They were good pictures.

"Q. Did you find anything in those pictures or in his scripts for those pictures which you believe to be improper [78] from a political standpoint?

"A. I read the scripts very carefully, and there is nothing in those scripts that I recall that was improper.

"Q. Were any of the pictures for which you say scripts had been written by Mr. Lester Cole exhibited at the time of the hearings referred to in 1947 or after those hearings?

"A. I think the nearest thing that Lester Cole had was 'Romance of Rosy Ridge.'

"Q. When was that released, do you know, about? A. I couldn't tell you.

"Q. Was that before or after?

(Deposition of E. T. Mannix.)

“A. It was released before the hearings. I think it was right on the tail end of it. It may have been out six or seven months.

“Q. Did you know whether or not the hearings had any effect upon the receipts for that picture?

“A. The picture had been played out practically.

“Q. Was there any other picture?

“A. Following the hearing, yes.

“Q. Which one? A. ‘High Wall.’

“Q. That was released when, approximately?

“A. That was released, I should say, six, eight, ten weeks after the hearings, somewhere in that period.

“Q. Has that picture been picketed?

“A. That picture has not been picketed. [79]

“Q. Are you familiar with this notice which was sent to Mr. Cole?”

“By ‘this’ I am referring to the notice that he was being suspended from his work.

“A. Yes, sir.

“Q. Was it sent pursuant to your instruction?

“A. Let me see it.

“Q. I don’t have the original.” [80]

* * * *

“Q. Did you direct this notice—this again is the notice of suspension,—be given to Mr. Cole?

“A. On legal advice.

“Q. On legal advice? A. Counsel.

“Q. It was done pursuant to your instructions? Isn’t that right? You received legal advice and

(Deposition of E. T. Mannix.)

then pursuant to your instructions this notice was given to Mr. Cole? A. Yes."

Mr. Margolis: If your Honor please, at this time I would like to offer in evidence as plaintiff's first exhibit a photostatic copy of a letter on the letterhead of Metro-Goldwyn-Mayer Pictures, dated December 2, 1947, addressed to Mr. Lester Cole and signed by Loew's, Incorporated, by its assistant treasurer.

I understand it is stipulated that this is a true and correct copy of the letter sent to Mr. Cole.

Mr. Selvin: So stipulated. [81]

* * * *

Mr. Margolis: I will read this letter which has just been admitted in evidence as Plaintiff's Exhibit No. 1, which is addressed to Mr. Lester Cole, and is dated December 2, 1947, and which reads as follows:

[Printer's Note: Plaintiff's Exhibit No. 1 is identical to letter set out in full at page 174 of this printed record.]

* * * *

Q. (By Mr. Margolis): I will ask you to what, if anything, other than the conduct before the committee, the words "for good and sufficient cause" in said notice referred?

A. I don't think I can answer that question. [84]

Q. Did you attend the meeting of the Association of Motion Picture Producers in 1947 prior to the hearing at which Mr. Johnston, the President of the Association, made certain proposals with re-

(Deposition of E. T. Mannix.)

spect to company policy or industry policy with respect to employment of Communists or alleged Communists?

Mr. Selvin: I object to the question upon the ground that it is incompetent, irrelevant and immaterial, and not within the issues of this proceeding. This is antedating the notice, on which the notice of suspension was issued.

* * * *

The Court: Let the record show that the following proceedings were had outside of the presence of the jury. [85] It is your turn, Mr. Selvin.

Mr. Selvin: The question to which I objected is addressed to whether Mr. Mannix attended a certain meeting of the Motion Picture Producers Association, prior to the hearing of the House Committee, at which Mr. Johnston made certain proposals with respect to company policy or industry policy with respect to the employment of Communists or alleged Communists.

I think it is only fair to say that it is a preliminary question, and is followed by what occurred at that particular meeting. Our point is that it has nothing to do that what was said or done at this meeting with respect to the industry policy or what was discussed, prior to this hearing has nothing to do with the issues here. It seems to us that it quite plainly has nothing to do with this, and that is the objection made by the defendant. [86]

Mr. Margolis: If your Honor please, I want to start out by pointing out to the court the fact of

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the notice leading down to conditions for the determination of the suspension, one condition being the purging of contempt and the second being the finding, or the affidavit, that the plaintiff, Mr. Cole, was not a member of the Communist Party. Apparently, the theory is that the misconduct of the plaintiff, or the alleged misconduct of the plaintiff, which it is claimed brought him into public disrepute, had to do with the relationship as to the question as to the Communist Party and that the function of the suspension was to dispel any idea that Mr. Cole was a Communist. We think we have the right to show, as we can show by this evidence, that the industry, prior to the hearing, had taken the position that it could not and would not act as a monitor over the political beliefs or affiliations of the employees; that that was their own business. And not only did this happen prior to the hearing but we propose to show that at the very hearing, at which Mr. Cole testified, and which testimony is the basis of the suspension—at these very hearings Mr. Johnston appeared and told the Committee that this was the policy of the industry. And this happened before Mr. Cole took the witness stand.

This is important in one other particular. The contract, which is not yet in evidence but which we will introduce in evidence, and particularly the section of the contract which [87] gives rise to the right of suspension, provides that the employee, Lester Cole, will perform and render his services hereunder conscientiously and to the full limit of his ability and

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as instructed by the producer at all times. This means, and we have authorities to support this proposition, that what Lester Cole was to try to do with respect to a situation such as this, or any situation, was to conscientiously do what he thought was right; to follow the instructions of the producer where those instructions were given and to act in these respects to the best of his ability. In other words, under the very terms of this contract, there is no breach unless the action of the employee is wilful, unless he has failed to attempt to follow the provisions of the contract to the best of his ability. That being so, it seems to us that it is extremely material to establish what position the industry took with respect to this subject, both privately and publicly, and particularly at these hearings, so that the jury can determine and can have the facts before it necessary to determine whether or not this conduct of Mr. Cole was wilful, whether he was refusing to follow instructions or whether in fact, under all of the circumstances, they can conclude that he was acting conscientiously, according to his own conscience in this matter, in an attempt to comply with the provisions of his contract; that he was not violating any instructions; that he was acting to the full [88] limit of his ability, and that he was basing his conduct, in part at least, upon public and private representations made to him and to the general public with respect to the industry's attitude concerning the question of its employees' political affiliations.

We think that for all of these reasons the matter is clearly material.

(Deposition of E. T. Mannix.)

The Court: All right, Mr. Selvin or Mr. Walker.

Mr. Margolis: Pardon me just a minute, your Honor. Mr. Katz directs my attention to the fact that at the hearings in Washington, D. C., and it appears at page 313 of the evidence, Mr. Cole's testimony appearing at page 486, and being a day or two after Mr. Johnston's testimony, Mr. Johnston read into the record before this Committee the complete statement to which the question here objected to has reference, and then testified that, although the proposal had been made to the industry to adopt a policy of refusing employment to persons believed to be Communists, this policy was rejected, and vigorously and unanimously rejected, by the industry. We think that this evidence, which, of course, would follow up our preliminary foundation testimony, is extremely material.

The Court: Is there any reply?

* * * *

[89]

Mr. Selvin: I shall be very brief, your Honor. My only purpose in replying at all is to indicate what I think the plaintiff is trying to establish, in order that our interpretation of their position may be of record, as I think there will be occasion on other phases of this case to refer to it. As I gather, Mr. Margolis' statement, or the sense of it, is that Mr. Cole, presumably becoming apprised of the proceedings that were had at this meeting of the Association to which the question relates, in some way relied upon it in determining his own course of conduct before the Committee. There is a difference there between what Mr. Cole knew, or thought he knew,

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about this situation and what actually occurred. What is now being sought to be brought before the court is evidence of what actually occurred and that may or may not be evidence of what Mr. Cole thought occurred.

The Court: Isn't that just an objection to the order of the proof; that it be safeguarded by a ruling, to tie it to [90] the testimony to be given by Mr. Cole?

Mr. Selvin: There is no doubt of that and my objection doesn't go to the mere question of procedure. It will have a considerable bearing when I think that certain objections probably will come from the plaintiff as to evidence that we propose to introduce.

The Court: Of course, if they want to open the front door of the barn, which I think should not be done, for reasons over which I have control, they lay themselves open to counter-attack and the defense is as broad as the attack. If they rely for whatever purpose upon the belief of Mr. Cole that his action was in line with the policy, and then show that that belief was not fantastic because it was based upon public action taken by the group, or private action, which he knew, then, of course, you would have as broad a scope in your defense in explaining the change of attitude, and that is already anticipated in the opening statement by Mr. Walker, where, assuming that this evidence would be offered, he stated he was going to show that they had reason to entertain certain beliefs regarding Mr. Cole and others who might come before the Committee.

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Mr. Selvin: That is precisely why I make the distinction. I want there to be no misunderstanding about it, so, at a later time, if this objection is now overruled, there can be no question about the theory upon which this particular [91] evidence is being proffered by the plaintiff. If I am mistaken as to why it is being offered, I will be glad to be informed of that mistake.

* * * *

Mr. Katz: I merely wanted to comment briefly in connection with the query of Mr. Selvin. Our position is, in short, among others, that it is always open to a discharged or suspended employee to show that the reason, where one is assigned [92] by an employer for the discharge, is not in truth and in fact the motivating reason. This has nothing to do with malice and this has nothing to do with motive, but it is always open for the discharged employee to show that the reason assigned by his employer when discharging him is not in truth and in fact the real reason which prompted the action by the employer.

Secondly, it is a rule, which I think stems directly from the Goudal vs. DeMille case, that it is appropriate for the discharged employee to show, by the acts and conduct of the employer, that the very act of the employer complained about was not contemplated by the parties to be the kind of an act which would give rise on the part of the employer to terminating the contract. The exact language in the Goudal case is that the evidence was admissible at least to show that the act complained of was not

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contemplated by the parties to be of that kind which gave rise to the right suspect.

The Court: As I tried that case of Goudal vs. DeMille, I want to make this observation about the case. That language is to be construed in the light of the evidence in the Goudal case. In the Goudal case, Miss Goudal grew temperamental and argued with Mr. DeMille, and, of course, that was not supposed to be done by stars at that particular time. She was supposed to say, "Yes, yes." I am making that statement [93] in view of an intimation that you may want to show, in regard to others, that such action was taken, as to which I don't want to commit myself at the present time.

Mr. Katz: I am limiting myself at the present time to this matter.

The Court: He actually discussed the matter with her and that is when I made the statement that the disobedience of an artist is not that of a menial, referring to the fact that a master can fire a servant if he fails to obey the master's order. I still hold that an artist cannot be treated as a menial and that the disobedience for which he or she can be discharged must be of a particular character. So I allowed them to show she could be in the picture until it was concluded. I held that by their conduct they not exactly waived the breach but they indicated they did not consider the type of disobedience one for which they had a right to discharge, and that was all that was proved in that particular case.

Mr. Katz: What I am trying to say, your Honor, in answer to Mr. Selvin, is our position is that this

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testimony is admissible, as a matter of law, on a variety of grounds and that, although as between the employer and the employee their discussions and their attitude concerning the political position or the absence of political position by Mr. Cole is admissible because they are the litigants, we don't for one [94] moment, by our silence, want to concede that opens the door for the collateral kind of smearing that the brief suggests it to be, to make a part of probative evidence in this case. [95] And I rise primarily merely to point out a legal basis for justifying the question without by my silence consenting to Mr. Selvin's at least inuendo in his commentary about the probative value of that evidence and its consequent effect on the front or rear door of the barn.

The Court: All right. It is your motion. You will have the last say. The zigzag stops with this one now. All right.

Mr. Selvin: This is not the time nor the place to make any reply to the charge or statement or reference to "smearing" that the defendant proposes to do, although I may say that if Mr. Katz refers to the subject that has been heretofore discussed in court, as to the admissibility of evidence relating to Communism, I am glad to have his concurrence and characterization of that type of evidence as being a "smear" of the individual to whom it refers.

The Court: All right. I will hide behind the statement. It is not to be assumed by my silence that I agree with either counsel on any of the legal pro-

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positions that they anticipatorily are discussing at the present time. All right.

I will decide at the proper time whether charging a person with being a Communist is or is not anything that degrades a person, because I will have to do that, either in the form of instructions or by ruling on evidence, and [96] I will do that at the proper time.

Mr. Selvin: Now, Mr. Katz's point is that they are entitled apparently to go into this question of the industry's acceptance or rejection of a non-Communist policy antedating these hearings, upon the theory that it might be some evidence that the assigned grounds of discharge or suspension, as the case may be, were not the true ones and that in some way the employer acted in bad faith in that connection.

Whatever the rule may be elsewhere, in *May* against New York Motion Picture Corporation, which I am sure your Honor is familiar with, reported in 45 Cal. App. page 369, that is an opinion by Judge Finlayson when he was sitting in the Appellate Court, in which he discussed rather extensively the question of master and servant as it relates to termination of employment.

* * * *

Mr. Selvin: The rule laid down in that case was that if there are grounds for discharge which exist in fact, the motive or purpose or intent of the employer in taking advantage of those grounds is immaterial.

The Court: That is true. I agree with you on that.

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Mr. Selvin: And they went one step further, that [97] whether or not an employee was required to obey the directions and instructions of the employer depended not on the good or bad faith of the employer in giving the instructions, but upon whether or not the instruction was a reasonable one having regard to the purpose and nature of the employment.

The Court: That is right.

Mr. Selvin: So that I say that it is entirely immaterial, even if it be a fact, which of course we do not admit, even if it be a fact that this notice of suspension was given in bad faith or was based on reasons other than the reasons assigned, it is entirely immaterial so far as the determination of Mr. Cole's rights with the Metro-Goldwyn-Mayer Company or Loew's Incorporated.

The question is whether the ground is sufficient to justify the action taken by the defendant, and we say as to that, that even if that action constituted a complete reversal of a prior policy adopted by either Loew's individually or by the industry generally, that it is beside the mark.

The question is whether the policy, when it was adopted by us with regard to Mr. Cole was or was not a policy which we were free to adopt.

* * * *

[98]

The Court: Yes.

In this May case, they merely consider the ques-

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tion of the word disobedience and stated the rule that:

“Disobedience by the servant of a reasonable order of the master is a violation of duty which justifies a rescission by the master of the contract of employment and peremptory discharge of the servant.”

We had to contend with that case in the Goudal case, because in the Goudal case it was the contention of Mr. DeMille that under this case he was the sole judge of the reasonableness of the order and that having given the disobedience at the time as a ground for discharge, that is why he had to introduce the modification that the disobedience of an artist is different from that of a menial.

Now, the court in emphasizing this opinion on willfulness—Mr. Justice Finlayson, whom we all know and who achieved a distinction as a practitioner later in life, after he retired from the courts—he had a bad campaign manager when he ran for the Supreme Court (I happen to be he), so he wasn't [99] elected, he was defeated by Judge Preston—he achieved distinction at the Bar until the very moment of his death; he was an old-fashioned lawyer and he summarizes law instead of just talking conclusions with you—he did not write the opinion that Mr. Cardozo called agglutinative tonsilloria (that is using a scissors and paper), but he made the statement in the opinion that if it is actual disobedience, then the motive of the master does not matter.

But ultimately we go back to the fact of whether the facts sought to be shown go not to the motive,

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but go to the existence of the cause. The complaint in this case—I was looking at it while you gentlemen were arguing and made some notes anticipatory of the trend of the argument—in this complaint, the plaintiff, after setting forth the notice, alleges that every statement of fact contained in the notice of suspension is false and untrue and the plaintiff so contends.

Then, they allege also that they didn't have the right to suspend and so, this being a declaratory judgment case, they are taking the burden which is not taken in an ordinary case, of showing the court that not only was there no legal right to discharge for the particular cause, but that that particular cause was not the real cause. In other words, it brings us to the type of cases we discussed in chambers during the conferences on pre-trial. It brings us back to [100] the civil service cases where a man is laid off, for instance on the ground that there isn't any work. We are talking about laying off which is similar to suspension. Now, the civil service cases allow the employee to show, when he is laid off on the ground of absence of work, that actually there wasn't any reason of that character. He may show, for instance, that in order to get rid of him, they took that work and gave it to somebody else or spread it amongst others, just to create a vacuum so that some favorite employee of the head of the department might walk in.

Ordinarily the testimony which is offered now would be defensive matter, in an ordinary lawsuit, but, this is not an ordinary lawsuit. This is a case

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in which the court has great discretion, as you all agree, and as I have held repeatedly and that all authorities agree, including Judge Dean Borcher who was the greatest authority on the subject, where the court has the discretion of refusing either a declaration along the lines asked by either side or altogether, if upon a complete showing the court feels that the declaration should not be made, but that the parties should be cast back to their remedy for breach and wait for an actual breach. Now, to overcome that principal of law, the plaintiff has the right to offer evidence to show, and they have done so, in this complaint, the plaintiff has [101] a right to show that—no. The plaintiff has a right to assume the affirmative and prove as a part of their case the non-existence of these grounds. You see, ordinarily in an action for breach of employment, all you introduce in evidence is the contract, the notice of discharge and evidence that the man was ready, willing and able to perform and he was discharged, which throws the burden upon the defendant to prove the legality of the discharge. [102]

But in this case the plaintiff has assumed the affirmative, as they may, in order to place before the court the reasons to support their contention that jurisdiction should be assumed for the purpose of determining the rights, and the defendants have joined them and the defendants seek an affirmation that they had a right to discharge.

So I feel, in view of the issues claimed in this case, the inquiry at the present time into these discussions, are admissible, and I will at the proper

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time instruct the jury as to any limitation that may be necessary to be placed upon the testimony.

I don't think that I should at the present time state upon what theory they are being received. I am stating ground which differs a little from the ground advanced by the plaintiffs, on the theory that not only I am not bound by that theory, but upon any other ground that is not urged, that the evidence is not admissible, that may be urged as error on appeal, regardless of whether they thought of it or not. So that for the reasons I have indicated, the testimony is admissible. I agree with you that the testimony may open a line of inquiry which would not be open to you but for their insistence, that the questions are proper. How broad that line of inquiry will be, I will determine at the proper time.

So the motion will be overruled, and unless counsel for [103] the defendant asks me to make any observations limiting the scope I will just allow it to go in without any comment to the jury. The court will now take a short recess.

(Short recess.)

The Court: Let the record show that the jurors have returned. I think you had better repeat the question.

Mr. Margolis: I understand, your Honor, that the objection to the question is overruled.

The Court: I do not think it necessary to in-

(Deposition of E. T. Mannix.)

form the jury, but if I did not make the ruling, I make it now.

Mr. Margolis: I will repeat the question which I have read:

“Q. Did you attend the meeting of the Association of Motion Picture Producers in 1947 prior to the hearings at which Mr. Johnston, the president of the Association, made certain proposals with respect to company policy or industry policy with respect to employment of Communists or alleged Communists?

“A. Is that the three-point plan that you are speaking of?

“Q. That is what I am speaking of.

“A. I attended that meeting.

“Q. Do you recall when that meeting took place?

“A. You can refresh me on the date. I was at the meeting. I don't recall the date. [104]

“Q. In any event, it was several months before the Washington hearings in October, 1947?

“A. If that is the date I was at the meeting. I don't recall the date.

“Q. But you know it was before the Washington hearings?

“A. We can get them from the minutes of the Association when it was held.”

Mr. Margolis: I have advised Mr. Selvin that I can state that the date was on or about June 2, 1947. I will state that such meeting, as we are talking about, was June 2, 1947.

Mr. Selvin: On or about June 2nd.

(Deposition of E. T. Mannix.)

“Q. That is Mr. Johnston proposed a program for the Association of Motion Picture Producers, did he not, consisting of three points, the first of which related to the type of investigation to be conducted by the Thomas Un-American Committee; the second of which reads as follows:

“ ‘Agreed not to employ proven Communists in Hollywood jobs where they would be in a position to influence the screen. Hollywood producers recognize the responsibility to keep the American screen free from Communists or any other subversive propaganda. The evidence is conclusive that Communists are a destructive force and their constant undercover activities are designed to create chaos and conflict. [105]

“ ‘We reject the Communist not because of his ideas but because of his allegiance and loyalty to a foreign power. Every American Communist is a potential foreign agent. America has never been afraid of new ideas. We welcome them in all fields, political, economic, and social.

“ ‘The free play of ideas is the strength of our democracy. It is the competition of ideas which makes America strong. Sedition is not competition, and this industry will not tolerate seditionists; but we must make sure we do not chip away our freedoms to get the seditionists.

“ ‘The protection of the innocent is still supreme. There is no higher duty under our American system of jurisprudence. We must be scrupulous to avoid indiscriminate labeling. Every time you tag

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an innocent person with a red label you play into the hands of the Communists.

“ ‘I am not interested in the pastel shades, the parlor pinks or salmon-colored zealots. They are just plain dupes and fools. My concern is the Red conspirator, the man who uses the freedoms of democracy to destroy democracy.

“ ‘We emphasize that in agreeing not to employ proven Communists we mean just that. The proof must be conclusive and it is the responsibility of the Un-American Committee to furnish the proof and the names.’

“Point three dealt with the employment of James Byrnes and certain other related matters. [106]

“Do you recall the submission of that program by Mr. Johnson? A. It is quite familiar.

“Q. That sounds to you like the one that was submitted? A. Yes.

“Q. Do you remember what happened at that—I will withdraw that. Do you remember who was present at that conference?

“A. Eric Johnston, and an associate with Eric Johnston, O’Hara, I am not sure whether Eddie Cheyfitz was with him or not. He may have been. Frank Freeman, Ben Kahane, Hal Roach. I think Leon Goldberg, Mr. Benjamin, Al Wright, Freestone——”

Mr. Selvin: That should be Freston.

Mr. Margolis (Continued reading): “Ben Silberberg. How many names is that? There were about 15 or 18 people present at the meeting.

(Deposition of E. T. Mannix.)

“Q. Do you recall whether there was pretty complete representation from the major studios?

“A. I think there was a representative of each studio. I don't know whether the director or the alternate was there in all cases. I don't know whether Joe Schenck was there or his alternate was there, but each studio was represented.

“Q. Following the presentation of this proposed program by Mr. Johnston, tell us to the best of your recollection [107] the substance of what was said and by whom.

“A. Wouldn't you rather have conclusions?

“Q. No.

“A. It is much easier to have a conclusion. I can remember the conclusions. The discussions I don't remember. Let me tell you the part I played in it.

“I am an emotional sort of fellow when I get through with myself, I saying what I want to say, I sort of forget what the others are saying in this particular matter.

“Number one was passed unanimously. Number three was passed but number two which dealt with the proven Communists—my stand on that was that I was not in a witch hunt, and I wasn't out to find Communists or to hurt Communists as long as I was able to protect the material on the screen, and that the screen if free of any Communistic propaganda.

“I wanted no part. I wanted to play no part in it. If there was an investigation to be carried on, I welcomed the Congress of the United States to carry on an investigation, but it was their responsibility

(Deposition of E. T. Mannix.)

to do it, and it wasn't our responsibility to have a witch hunt, who and who was not a Communist.

"Number one, my stand was that we were not capable of deciding who was a Communist or who was not. I think I cited at the time that the FBI have failed in fighting Communists and proving anyone as a Communist, and I didn't want [108] to be part of any such rule. Others joined in on a similar basis.

"I think I was the first one to speak, and I think that the majority of men who followed me expressed a similar opinion. I will repeat myself in what they had said because I have got so much ego, I think they quoted me on what I had said, and we voted it down unanimously and the three-point program was carried and number two was rejected.

"Q. Anybody say anything about a blacklist?

"A. Any time that you speak of not hiring somebody for some reason—I imagine somebody brought up the word 'blacklist'. I don't recall it. I know that Mr. Johnston in his testimony mentioned it in Washington, that someone had objected to it I believe as a blacklist. I don't recall that part of the conversation.

"Q. Recall anybody saying anything about the procedure of producers acting jointly in any way being illegal?

"A. I think counsel during the time expressed some opinions on it. I don't recall who, but someone expressed an opinion.

"Q. Do you recall what it was?

"A. I think you answered it yourself. Your ques-

(Deposition of E. T. Mannix.)

tion answered it. I mean, it was a rejected plan. Rejected plans don't stay with you. It is the conclusion of those plans that stays with you. [109]

“Q. Now, between that time and the time of the Hollywood hearing in Washington, D. C., which was October, 1947, can you recall any other meetings of the Association of Motion Picture Producers at which the subject of employment of Communists or alleged Communists was considered?

“A. I don't believe there was another meeting held in which it was discussed.

“Q. Now, following—strike that.

“A. In fact, I am sure that I was not in any other meeting at which it was discussed.

“Q. Following the hearings in Washington, a meeting was held in New York on or about November 25, 1947, was there not? A. Yes, sir.

“Q. Was there a meeting of the Association of Motion Picture Producers, which is the Western organization, or of the Eastern organization, or of both, or of neither?

“A. I don't think it would have been either the Eastern or Western. It struck me that there were people there that were not members of the Association. I couldn't say. I don't think it was called by either Association. It may have been. I was invited there by telephone.

“Q. From whom did you receive the invitation?

“A. Mr. Nicholas Schenck.

“Q. What is his position? [110]

“A. President of Loew's, Incorporated.

“Q. What did he tell you about the meeting?

(Deposition of E. T. Mannix.)

“A. Only that there would be a meeting in New York on a certain day and he wanted me to be there.

“Q. Did he tell you who was calling the meeting?

“A. He did not.

“Q. Did he tell you what the meeting was about?

“A. Oh, yes, he told me it was about the situation of the congressional investigation.

“Q. When did you receive the call from Mr. Schenck?

“A. On the—oh, it couldn't have been more than two days prior to my departure.

“Q. When did you leave? About the 23rd? Did you fly or go by train?

“A. I went back by train.

“Q. When did you leave? Do you remember?

“A. Well, I arrived there on a Sunday. I believe it was Sunday I arrived in New York, so I must have left on a Thursday. I believe I arrived Sunday morning in New York.

“Q. The meeting was on a Monday and Tuesday, was it?

“A. I think the meeting was on Monday.

“Q. Where there two days of meetings?

“A. The opening meeting was Monday and the following day was Tuesday, the second and final meeting.

“Q. Anybody else from Loew's, Incorporated, go from the [111] West to New York besides yourself?

“A. Mr. Mayer, Mr. Joe Schenck and Irving Berlin and I went to New York.

“Q. All of you attended these meetings?

“A. All but Berlin.”

(Deposition of E. T. Mannix.)

Mr. Margolis: The answer here is Joe Schenck. I understand he is not with Loew's, Incorporated.

Mr. Selvin: The witness' answer says he is not. "The Witness: No, he is with Twentieth Century-Fox.

"Q. Where were the meetings held in New York?

"A. At the Waldorf-Astoria.

"Q. Who presided? A. Eric Johnston.

"Q. Eric Johnston is the president of both the Eastern and Western Associations, is he not?

"A. Yes.

"Q. Did he open the meeting? Did Mr. Johnston open the meeting?

"A. I believe he did."

Mr. Margolis: We will pass for the moment to another subject.

"Q. As a matter of fact, do you know of any information, do you have any information at all of any adverse effects upon box office receipts by the hearing?

"A. I wouldn't be familiar with box office receipts. [112]

"Q. You never have received any information to that effect, have you?

"A. I have never received any.

* * * *

[113]

Mr. Margolis: "Prior to the meeting in New York, Loew's, Incorporated, acting either through its Board of Directors, or through any of its officers including yourself, had taken no position, had established no policy with respect to employment of Communists or alleged Communists or with respect to

(Deposition of E. T. Mannix.)

the employment of the ten who were cited for contempt? A. Prior? No, we had not.

“Q. Thereafter, following this, Loew’s did carry out the policy established at the meeting in New York, did it not? A. Yes.

“Q. Following the hearings, shortly following the hearings, did Loew’s, Incorporated, re-release a picture known as ‘Ninotchka?’ [115]

“A. I think it was long after the hearing.

“Q. About how long after the hearing?

“A. I think we released in January or February—January.

“Q. It is a fact, is it not, that Metro, which is the trade name for Loew’s, Incorporated, issued publicly to the effect that in order to combat the ill will established by the House Un-American Committee’s Red problem it was releasing ‘Ninotchka’?

“A. I am not familiar with the campaign on it.

“Q. Did you see such publicity?

“A. No, sir. I think it was released in two places, Los Angeles and New York.

“Q. Now, it is a fact, is it not, that the resolution which was adopted in New York read as follows: ‘Members of the Association of Motion Picture Producers deplore the action of ten Hollywood men who have been cited for contempt by the House of Representatives. We do not desire to prejudge their legal rights, but their actions have been a dis-service to their employers and have impaired their usefulness to the industry. We will forthwith discharge or suspend without compensation those in our employ and we will not reemploy any of the ten until such

(Deposition of E. T. Mannix.)

time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist. On the broad issue of alleged subversive [117] and disloyal elements in Hollywood, our members are likewise prepared to take positive action. We will not knowingly employ a Communist or any member of any party or group which advocates the overthrow of the government of the United States by force or by any illegal or unconstitutional methods. In pursuing this policy, we are not going to be weighed by hysteria or intimidation from any source. We are frank to recognize that such a policy involves dangers and risks. There is the danger of hurting innocent people. There is the risk of creating an atmosphere of fear. Creative work at its best cannot be carried on in an atmosphere of fear. We will guard against this danger, this risk, this fear. To this end we will invite the Hollywood Talent Guilds to work with us to eliminate any subversives, to protect the innocent and to safeguard free speech and a free screen wherever threatened. The action of a national policy established by Congress with respect to the employment of Communists in private industry makes our task difficult. Ours is a nation of laws. We request Congress to enact legislation to assist American industry to rid itself of subversive disloyal elements. Nothing subversive or un-American has appeared on the screen. Nor can any number of Hollywood investigations obscure the patriotic service of the 30,000 loyal Americans employed in Hollywood who have given our government invaluable aid in war and peace.' [117]

(Deposition of E. T. Mannix.)

“Is that the resolution which was adopted?

“A. I believe that is. You from a copy of it?

“Q. I have read from a press release which I understand is a correct copy of it. Does it sound like it? A. It sounds like it to me.

“Q. Now, in that resolution, the statement is made that the industry does not intend to yield to public hysteria in carrying out this policy. You recall that, do you not? A. Yes, sir.

“Q. You have testified that Loew's has adopted this policy. I will ask you whether or not it is the policy of Loew's not to yield to criticism from newspapers, threats, threats of organizations to boycott the industry because of the policy which it has established as similar action from other sources?

“Mr. Selvin: He is asking you what the policy is.

“A. We have expressed ourselves that we would not be harassed into any action by the press or by organizations or by groups who will threaten, so that is not a part. Our policy is not to pay heed to groups of that sort.

“Q. To groups and to editorials in the paper and so forth, is that right? A. Editorials.

“Q. At any time, have you ever been contacted by any representatives of the Committee on Un-American Activities? [118] A. Smith and Galleys.

“Q. Leckie?

“A. Leckie called on me one day, and introduced themselves, said they were—

“Q. Before we go into that, if I may interrupt you, do you remember when it was, approximately when it was that they called upon you?

(Deposition of E. T. Mannix.)

“A. Well, it was some time after their spring investigation here, and the Washington investigation, and it may have been four weeks before the Washington or six weeks before the Washington investigation.

* * * *

“Q. In other words, that would bring it about September of 1947?

“A. Somewheres in that time.

“Q. They called at your office? They telephoned to you first for an appointment? A. Yes.

“Q. They told you they were representatives of the House Committee on Un-American Activities?

“A. Yes. [119]

“Q. Will you tell us what conversations took place? Was anybody else present at the time besides yourself and these two gentlemen?

“A. Just the three of us.

“Q. Will you tell us what was said?

“A. Well, I granted them the interview, and I welcomed the opportunity of telling them what I thought of their investigation as far as it had been carried on. I did most of the talking. They came in and introduced themselves, and, well, I said, ‘I am happy that you are here in Hollywood on an investigation and happy you carried on in Washington.’ I said, ‘What do you want me for? I can’t get you any publicity. Leave me out. Mr. Thomas wants publicity. I think it is a witch hunt. I think it is unfair. I don’t think you are carrying it on honestly. I don’t think you are doing anybody any good in the way you are doing.’ This went on for 20 minutes,

(Deposition of E. T. Mannix.)

my condemnation of the procedure, not what they started out to do because I still welcomed an investigation. If we are wrong, we should be investigated. I don't think we were wrong, and that is why I was so willing to have an investigation. I didn't think the industry was wrong, and I thought that this was just a shoddy way of getting publicity, and I don't think—whether this was what discouraged them from subpoenaing me to Washington, or whether they didn't like my attitude towards the plan, they spoke of some of the men— [120] they weren't nearly as gullible in giving names as people would believe. They asked about certain people who worked for us.

“Q. Do you remember who they asked about?

“A. They asked about Dalton Trumbo. They asked about Lester Cole, and, well, I said, ‘I don't give a damn whether they are Communists or not.’

“Q. What did they ask you about?

“A. They wanted to know whether I knew if they were Communists, and I said, ‘No, and I don't give a damn whether they are Communists or not. All I am looking for is getting people to write scripts for me and my responsibility if he is a Communist or Democrat or Republican, that the ideology is not put on the screen, except entertainment is put there. I assume that responsibility, and I feel that it is in good hands right now because our record is very clear.’ ‘Well,’ he says, ‘What about the Song of Russia?’ I said, ‘I think you are a naive man to consider Song of Russia Communistic propaganda,’ and I said, ‘I have just no patience with a man who can look at that—’ and then the discussion came up

(Deposition of E. T. Mannix.)

of what was Communist propaganda. I, of course, dramatized my position in it and I started quoting who were they. They thought the banker who foreclosed the mortgage was wrong. That is drama since 200 years to foreclose the mortgage. In fact, I said, 'What about the 13 pieces of silver?' Then I said, [121] 'It goes back that far. Boys, you are going to demand something,' and they, of course, tried to get out of what they were considering Communist propaganda because they weren't getting a very welcome reception from me, and I didn't intend to make it welcome. I asked them to come up because I wanted to put my position quite clearly before them. They got through, and, in fact, they arranged their interview, if I might say, through Whitey Henry, Chief of Police at our studio, and, when they got all through, they were very friendly. There was no hard feelings. They thought I was a little tough on the Committee. Well, I said I would be tough on anybody who would do things the way I think you are doing them. They could have been right, I could have been wrong, but nevertheless that is the way I felt about it, and they mentioned some other names. I don't recall who they were. They didn't work at the studio, didn't make any difference to me. I don't know them, didn't know their political affiliations. I said I didn't know anything about it, but the chances are you are wrong, and with that they said, 'I don't think we can get very far with you,' and they left.

"Q. Did they mention any other pictures besides 'Song of Russia'?

"A. I tried to get them to mention the pictures.

(Deposition of E. T. Mannix.)

They said they had a list of 30 odd pictures and I tried my best to get them to mention the pictures. I offered this to them. [122] I said, 'Now, look, gentlemen. This is a peculiar business. Our evidence of what we do, you can have it, can have it, anybody can have it. There it is. It is on the screen. We can't change it. There it is. I will put at your disposal a projection room and operator and all the films which were made over the last 20 years for you to run, and I defy you to come in with any Communist propaganda.' I said, 'We can't change that. You can't get any better evidence than that. The only thing you can do is make me a liar, and I am not going to lie if I show you the films.' I said, 'You look at them.' He went on to see 'Song of Russia'. After that invitation, he said it was Communistic. I said, 'The hell with you,' and I walked away. I left him in the hall and had no patience with a man who would tell me that was Communist propaganda.

"Q. Did you show him any other pictures?

"A. He didn't want to see any more. He had found the cure that we were guilty of Communistic propaganda.

"Q. Did he state what was Communistic in the picture?

"A. Didn't give him an opportunity to.

"Q. In your previous discussion, did you mention anything that was said in motion pictures that was Communistic propaganda?

"A. Yes, he said 'Best Years of My Life' was Communistic.

* * * *

[123]

(Deposition of E. T. Mannix.)

Mr. Selvin: I want to interrupt to say that that was not a Loew's picture. It was produced by Samuel Goldwyn and not Loew's, Incorporated.

Mr. Katz: If they want to disavow the picture, it is all right with us.

The Court: If you say that is the case, I will so instruct the jury.

Mr. Selvin: It is the case.

The Court: It gives the continuity of the conversation between those you named and Mr. Mannix.

Mr. Katz: We will stipulate it may go out.

The Court: What did you ask? You just asked for a stipulation it was not your picture, is that right?

Mr. Selvin: That is it.

The Court: Ladies and gentlemen of the jury, when counsel stipulate to a fact, it means no other evidence is require to prove it and you are to take it as a fact. It is agreed by counsel this picture they are talking about, "The Best Years of My Life", was not produced by Loew's, Incorporated. I am quite certain some of you have seen it. Even I, who have very little time to see any picture, have seen it. So it was not produced by Loew's. Go ahead.

Mr. Selvin: May I make one statement in view of Mr. Katz's statement? I am not intending in any way to reflect on the picture. [124]

The Court: Oh, no. The greatest love and affection exists between the various motion picture companies regarding their productions and nothing said here has any similarity to any criticism or statement.

Mr. Selvin: When I think it is a bad picture,

(Deposition of E. T. Mannix.)

I will say so, but I want it clear in this situation that I am not contending it was a bad picture or a Communistic picture. We do not make any such contention.

Mr. Margolis: I am very happy to so stipulate.

The Court: Ladies and gentlemen of the jury, you are not going to be called upon to decide whether any pictures were good or bad. We are not engaged in a contest of that kind because it would be difficult to establish legally what somebody might consider a colossal picture or a junk picture. We are not here for any such purpose. And any mention of any picture is done because it comes in in the deposition and it does not imply approval or disapproval of the artistic or commercial merits of the picture. Let's go on. I am not requested to make any comment except the fact that you agree it was not produced by Loew's, Incorporated.

Mr. Margolis: Yes.

The Court: All right.

“Q. (By Mr. Margolis): Did he say what part? A. ‘Best Years.’

“Q. Did he say what part? [125]

“A. That dealt, I am sure, with the banker. He didn't tell me what. I am sure because there was—‘Margy’ he couldn't understand. I can't figure out to this day ‘Margy.’ Then there was a picture that Dalton wrote at RKO, ‘Tender Comrade.’ They mentioned ‘Tender Comrade’ and one or two other pictures which were completely—oh, they

(Deposition of E. T. Mannix.)

mentioned the one Frank Capra made. Was it 'Joe Go' or 'Mr. Smith Goes to Washington,'—the one where the police department was taken over by the politicians. Well, anyway, they mentioned that picture. I don't know whether Smith is a capable investigator or Leckie is a capable investigator, but they didn't impress me in their approach to this whole thing, and I treated them accordingly.

"Q. Did they mention—did they make any suggestion concerning the discharge of anybody?

"A. I don't recall that.

"Q. Did they say anything about the industry cleaning its own house or would be investigated?

"A. It is very possible they did. I don't recall. It is possible. It is possible they asked about some dismissals, but, if they did, my attitude, if they were Communists, I don't believe that they are Communists. [126]

"Q. Let me ask this. Do you have any recollection of the use of the phrase by them 'You had better clean your house' or something like that?

"A. I have heard it so much, Mr. Margolis, I can almost say they said it, but I would hate to say here that I recall them saying it. The expression has been used so much in Hollywood you can attribute it to anybody." [127]

* * * *

(Deposition of E. T. Mannix.)

Los Angeles, California

Wednesday, December 8, 1948, 3:05 P.M.

* * * *

“Q. At the time that Mr. Cole—are you a member of the council of Mr. Mayer’s council—the production——

“A. Mr. Mayer is no longer on the council. I took Mr. Mayer’s place on the council.

“Q. Well, he was a member when you also were a member?

“A. No, I was not. I substituted for him and so he resigned and I took over for him.

“Q. Do you know what council I am talking about?

“A. You are talking about the industry.

“Q. I think—Mr. Mayer has within the office, within the company sort of a cabinet?

“A. That is right.

“Q. Are you one of the people on that?

“A. You mean on our company? I thought you were [129] speaking about the industry council.

“Q. You are one of—— A. Yes, sir.

“Q. Do you remember any discussion concerning Mr. Cole about the time that he was hired?

“A. Discussion in what way?

“Q. Well, about whether or not he should be hired? A. I don’t recall.

“Q. Do you remember Mr. McGuinness strongly opposing his being employed?

“A. If Mr. McGuinness did, it wouldn’t have

(Deposition of E. T. Mannix.)

made any impression on me. It would have been on the ground he was supposed to be a Communist, so that would have made no difference with me at all.

“Q. You don’t recall?

“A. I don’t recall.

“Q. Do you recall Mr. McGuinness opposing the employment of people because he claimed they were Communists?

“A. To the other extreme. I have heard him say he is a very capable fellow, but he is a little Red. He would say he is a very capable fellow. He is a little Red, and if he didn’t think he was capable, he kept his mouth shut. He never used the word ‘Communist’ while he was around. He used Mr. Johnston’s phrase that he was a little pink, red or salmon. [130]

“Q. Did you ever tell Mr. Thau that you had received a call from an investigator and that the investigator had demanded that you discharge Cole or suffer the unpleasant consequences of a hearing in Washington? A. I don’t recall it.

“Q. Say in substance.

“A. I don’t recall ever saying anything like that. Mr. Mayer believes that I am supposed to have said that the investigator said they wanted us to fire Cole, and I wouldn’t fire Cole. He seems to think that I told that to him; I don’t recall it.

It is very possible. If the investigator said it to me, I would have told him I wouldn’t have fired Cole. That I will guarantee you so with so

(Deposition of E. T. Mannix.)

much of what I would do—in the statement that it is possible that I have said it.”

The Court: No comment.

“Q. (By Mr. Margolis): Do you remember calling Mr. Cole to tell him that a United States Deputy Marshal was in your outer office with a subpoena for Mr. Cole? A. Yes, sir.

“Q. And asking him whether he wanted to come up and accept service or not? A. Yes.

“Q. And that he replied that he had no intention of ducking and told you that he was in the barber shop at that [131] time?

“A. Very distinctly.

“Q. He would come right up.

“A. Very distinctly. I did that for no other reason—I wanted to advise Lester that the man was there.

“Q. That is right. At that time he came up and did take the subpoena?

“A. I don’t recall that. I know that he said, ‘I will be right up.’ I don’t think he took it out of my outer office. I wasn’t present.

“Q. Do you remember that he saw you immediately afterwards, and you told him to go to the office of Mr. Hendrickson, the studio contract attorney?

“A. I don’t recall. Why would I tell him to do that?

“Q. Remember at that time you were negotiating or had been negotiating for the rewriting of

(Deposition of E. T. Mannix.)

Mr. Cole's contract in certain respects in connection with the taking up of his option?

"A. I don't remember. Any bearing that would have—I don't see what bearing that would have on me sending him to Hendrickson's office.

"Q. Isn't Hendricks——

"A. He is the contract man.

"Q. Wasn't the man who served the subpoena in Mr. Hendrickson's office—— [132]

"A. That is possible because all men who serve subpoenas go to Hendrickson because he is the officer who accepts service.

"Q. Do you know at time immediately after the service of the subpoena Mr. Hendrickson handed Mr. Cole the revised contract containing the changes that you have testified about?

"A. I can't place the dates. All I know is that there was a period of time—I think his contract was due on October. The option was due on October, and it was exercised in July. Is that the date? It was about eight weeks before or six weeks before. I wouldn't have set it to Hendrickson on account of that.

"Q. Did Mr. Mayer tell you about a visit which he had from Mr. Smith and Mr. Leckie?

"A. Yes, sir.

"Q. Do you remember his telling you, remember what he actually told you about that?

"A. He told me these two fellows—in fact, I asked Mr. Mayer to see them.

"Q. Oh, I see, and did Mr. Mayer tell you

(Deposition of E. T. Mannix.)

that they had said something to him that the studio ought to clean its own house before it was forced to do so by an investigation? A. Yes. [133]

“Q. On July 23, 1947, there appeared in the ‘Hollywood Reporter’ an article captioned ‘Hollywood Gets Sixty Days to Oust Subversives’ and reading:”

Mr. Selvin: Just a moment. Is this being offered in order to prove the truth of the facts stated, or merely as information which came to the attention of the witness, because if it is the former we will object to it on the ground that it is hearsay and not binding; and if it is the latter, we have no objection.

Mr. Margolis: It is the latter.

Mr. Selvin: At the appropriate time, after the answer has been read, may the jury be so informed, your Honor?

The Court: Well, you are offering it merely as a source of information.

Mr. Margolis: Well, as a knowledge, to show what knowledge Mr. Mannix had.

The Court: You are not objecting, if so limited, is that right.

Mr. Selvin: That is right.

The Court: Well, it is so limited. Ladies and gentlemen of the jury, you have heard the statement of counsel that the answer is allowed for that limited purpose of showing the basis of Mr. Mannix’s information, not as the truth of the fact of any statement that he made.

(Deposition of E. T. Mannix.)

Mr. Margolis: We will go ahead with the question. [134]

The Court: Go ahead.

Mr. Margolis (Continuing):

“An article” * * * and reading: ‘Hollywood has sixty days to shake itself free from subversives, and he is here to help, H. A. Smith, former G-Man, said here today on his arrival to head a program being conducted by the House Committee on Un-American Activities. Otherwise the industry can only blame itself when such persons are exposed publicly at hearings scheduled in Washington September 23.

‘In the last analysis, the studios themselves are responsible for any Communist penetration of pictures. I plan to hold a number of meetings with industry heads, and the full resources of the House Committee and your investigative staff are at the disposal of those who want to put their house in order before Congress does it for them.’

End of the article.

“Do you remember—did you ever read that article in the Hollywood Reporter?

“A. I don’t recall reading it because it would have made no impression on me whatsoever. I don’t think I would have read the whole article if I read what Mr. Smith was going to do.

“Q. My having read that, does that refresh your recollection in any way as to what Smith and Leckie said to you at the time they called upon you? [135]

(Deposition of E. T. Mannix.)

“A. No. I gave you a pretty clear picture of what Smith and Leckie and I spoke about in our 20 minutes.

“I spent a good part of that 20 minutes with Mr. Leckie who had a brief case with him which I wouldn’t let him leave in my office. ‘Now, you take that outside and make notes if you want to, but you are not going to have your recording machine here,’ which I was clowning with him. He wanted to take it out, but we talked about that for about ten minutes.

“Mr. Margolis: I think that is all.”

Mr. Margolis: Now, if your Honor please, there is examination by Mr. Selvin in the deposition, but I will leave it to Mr. Selvin to put that in.

The Court: All right.

* * * *

Mr. Selvin: There are certain portions we want to offer, but may we defer it until after Mr. Mayer has testified, as we would like to finish with him today, if we could.

The Court: That is all right, to accommodate Mr. Mayer. [136]

Mr. Katz: The next witness is Mr. Jack Cummings, called under the provisions of Rule 44(b).

JACK CUMMINGS,

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

The Witness: Jack Cummings.

(Testimony of Jack Cummings.)

Direct Examination

By Mr. Katz:

Q. In the year 1945, sir, where were you employed?

A. At Metro-Goldwyn-Mayer Studios.

Q. In what capacity were you thus employed?

A. As a producer of motion pictures.

Q. You were a producer of motion pictures for Loew's, Incorporated, otherwise known as Metro, in 1945? A. That is right.

Q. For how many years prior to that time had you been thus employed?

A. For about 15 years.

Q. Were you the producer who had the immediate direction and control of the services of Mr. Lester Cole as an employee of Loew's, Incorporated? A. I was.

Q. In 1945 did Mr. Cole work for you at Loew's, Incorporated, as a writer? [137]

A. He did.

Q. And in 1945 was he first there employed on what is called a week-to-week free-lance basis?

A. I think he was.

Q. At that time do you recall what his week-to-week free-lance basis salary was?

A. I think it was in the nature of a thousand dollars a week.

Q. And while he worked on a free-lance basis you had an opportunity to judge the character of his services as an employee of Loew's, did you not? A. I did.

(Testimony of Jack Cummings.)

Q. Will you tell us whether you were entirely satisfied with his services?

A. I was entirely satisfied.

Q. And late in 1945 did you not think that the services of Mr. Cole were so satisfactory that you wanted him to work there, not on a week-to-week basis, but on a fixed term written contract?

A. That is right.

Q. Did you then, late in 1945, go to Mr. Sam Katz, producer of the unit in which you were the executive producer, at Loew's, Incorporated, and recommend to Mr. Katz that the studio place Mr. Cole under a written contract?

A. I did. [138]

Q. Following your recommendation of Mr. Katz, Mr. Cole was placed under a written term contract, was he not?

A. That's right.

Mr. Katz: I show to counsel, and there is no dispute, but that I have in my possession and will offer in evidence, as plaintiff's exhibit next in order, the employment contract, between Loew's, Incorporated, and Mr. Cole, and it has been stipulated that it is a true and correct photostatic copy.

The Court: All right.

* * * *

[Plaintiff's Exhibit 2 is the document, a copy of which appears elsewhere herein as Exhibit A attached to the complaint.]

Q. I call your attention, Mr. Cummings, particularly [139] to the scripts that Mr. Cole wrote under your supervision, while employed as a writer,

(Testimony of Jack Cummings.)

early in 1947. Will you give the names of those?

A. Mr. Cole wrote the script for *Romance of Rosy Ridge*, and wrote the script for *Fiesta*, and wrote the original story for the *Mercer Girls* and the script on the life of *Zapato*.

Q. In addition to the work he did under your supervision, he worked on the screen play, did he not, for the picture, later released by Loew's, called *High Wall*?

A. Yes, I think he did, in collaboration.

Q. With Mr. Lord? A. Yes.

Q. You made an examination of that screen play, did you not? A. I did.

Q. From your examination of that screen play, was there anything in that screen play which in your opinion, by any standard, would be improper or un-American in any respect? A. No.

Q. And it was American in every respect?

A. Absolutely.

Q. In respect to *Fiesta*, that was a screen play which was done, I think you said, under your supervision? A. That is right. [140]

Q. Was there anything in that screen play, or anything put in the script, or anything put in the continuity, which in your opinion could be considered by any standards as improper in any respect? A. There was not.

Q. You were entirely satisfied with what Mr. Cole did? A. I was.

Q. Turning your attention to the period 1947, which was some year after he was under contract,

(Testimony of Jack Cummings.)

did you look to any negotiations that were pending, giving to Mr. Cole an increase, or an upward revision of Plaintiff's Exhibit No. 2, which is in evidence? A. Yes.

Q. Were you of the opinion, in 1947, that the work Mr. Cole had done under the terms of his agreement of employment were such as justified Mr. Cole getting even more than the contract provided for? A. Yes.

Q. Did you, so feeling, in a conversation with Mr. Sam Katz, or any other producer of the studio, recommend that they revise Mr. Cole's contract upward? A. Yes, I did.

* * * *

Q. Mr. Cummings, you in substance advised, did you not, Mr. Katz, in charge of this unit of which you were connected, or your feelings concerning the terms of this contract? A Yes.

* * * *

Q. (By Mr. Katz): You repeated to Mr. Cole, did you not, the conversation that you had had with Mr. Sam Katz? A. Yes.

Q. Tell us what you said to Mr. Cole.

A. I told him we had a program laid out, Mr. Cole and myself——

The Court: You are telling us what you told Mr. Cole in your conversation with Mr. Katz?

(Testimony of Jack Cummings.)

The Witness: That is right. That is the way I understand it.

The Court: I am glad you do. [142]

A. I told Mr. Cole that I had talked to Mr. Katz about getting an increase in salary. Mr. Cole, I might add, felt that he was entitled to an increase in salary and I thoroughly agreed with him. And on that basis, of his excellent work for me, the plans which we had for the future of making pictures—on that basis I went in and spoke to Mr. Katz.

Q. At about the time of these discussions between yourself and Mr. Katz, about the same time, there was called to your attention and you heard, did you not, of the claims that were being made concerning the alleged political activities of Mr. Cole?

A. Yes; I had.

Q. After hearing the assertions made in the press and other places concerning Mr. Cole, you still felt, did you not, and so advised Mr. Cole, that he was entitled to have an upward revision of his contract?

A. That is right. I don't know whether or not the article in the Hollywood Reporter came before or after that. I am not sure of the date.

Q. In any event, despite the rumors, you still felt and so advised Mr. Cole that you believed him entitled to a even better contract than the one he then had, is that true?

A. That is right.

(Testimony of Jack Cummings.)

Q. Mr. Cummings, in the month of September, 1947, on what screen play was Mr. Cole engaged for Loew's, Incorporated? [143]

A. I think it was *The Life of Zapata*.

Q. And he was then working under you or under your supervision on that particular screen play?

A. That is right.

Q. Shortly before he left for Washington pursuant to the subpoena, which will be introduced into evidence through another witness, shortly before he went to Washington, D. C., did you discuss with him the matter of his continuing to work on the screen play *Zapata*?

A. Yes.

Q. What suggestions or advice did you give him with respect to continuing with his work even when he was on his way to Washington?

A. I gave him no advice. He volunteered to finish the job while he was on the trip to Washington, the outline for the making of the picture.

Q. You wanted that work completed, did you not?

A. I did.

Q. That is, that Mr. Cole was to continue the work of completing the outline of *Zapata* even while in Washington, is that correct?

A. That is right.

Q. You understood before he left for Washington that he was to do that?

A. That is right. [144]

Q. And, while Mr. Cole was in Washington, Mr. Cummings, there was delivered to you, was there not, a memoranda, writings of Mr. Cole, notes

(Testimony of Jack Cummings.)

and suggestions made by him while in Washington?

A. That is right.

Q. And they were turned over to you during the course of these very hearings in Washington, is that right?

A. That is right.

Q. Upon Mr. Cole's return to Hollywood, which the evidence will show was very early in November, unless you can remember better, did Mr. Cole report back to you and begin to work again on Zapata?

A. That I don't remember.

Q. Following these hearings, did you meet with Mr. Cole?

A. Yes; I did.

Q. And, when you met with Mr. Cole, did you discuss Zapata?

A. Yes; we did.

Q. And did Mr. Cole continue to confer with you, as a writer of Zapata, following his return from Washington?

A. I think he did.

Q. Following his return from Washington and while he conferred with you on Zapata, and as of that time, Mr. Cummings, was the work of Mr. Cole, in so far as you were [145] concerned, as an employee of Loew's, Incorporated, entirely satisfactory to you?

A. Yes; it was.

* * * *

Q. Mr. Cole continued working under your supervision, did he not, from the time he returned to Hollywood, following the hearings in Washington, until sometime around December 3, 1947? That is the date of the receipt of the notice of suspension?

A. Yes; he did. [146]

* * * *

(Testimony of Jack Cummings.)

Q. (By Mr. Katz): From the time Mr. Cole returned to Hollywood, until on or about December 3, 1947, Mr. Cole continued to work with you, did he not, in the preparation of the screen play Zapata? A. He did. [147]

Q. Was there anything in his services between the date of his return from Washington to Hollywood and December 3, 1947, to which you made any objection or complaint? A. No.

Mr. Katz: You may cross-examine.

Cross-Examination

By Mr. Walker:

Q. Mr. Cummings, did I understand you to say that the screen play called Mercer Girls was written by Mr. Cole? A. That is right.

Q. That was not produced?

A. No; it wasn't.

Q. And it has not been produced as yet?

A. No; it hasn't been.

Q. And is not in production at this time?

A. No, sir.

Q. In the conversations that you had with Mr. Cole preceding his trip to Washington in the fall of 1947, did Mr. Cole ever tell you or ever state to you that he was not a Communist?

A. No.

Q. He never made such a statement?

A. No.

Q. Did Mr. Cole in any of these conversations and at any time before he went to Washington tell you how he proposed [148] to conduct himself or

(Testimony of Jack Cummings.)

how he proposed to testify at the hearings in Washington? A. No; he did not.

Q. Zapata was a picture which you have testified Mr. Cole worked on with you. That has not been produced as yet? A. No, sir.

Q. And is not in production at the present time?

A. No, sir.

Mr. Walker: That is all.

Redirect Examination

By Mr. Katz:

Q. Just one question. In the motion picture industry, it is customary, is it not, that there be a time lapse between the time when work is completed on a screen play and the time when production actually begins on that screen play, isn't that true? A. That is right.

Mr. Katz: That is all.

The Court: I gather from the name Zapata that it referred to an actual character in Mexican history, a man known as "Zapata"?

A. You are right, your Honor.

Q. And who participated in certain agitation something like the predecessor of Villa?

A. They were contemporary, your Honor. [149]

The Court: I just wanted the jury to understand that it was an actual character in Mexican recent history. A. That is right.

* * * *

L. B. MAYER,

a witness called by the plaintiff, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. Louis B. Mayer.

Mr. Margolis: This testimony is also being taken under Rule 23(b), if your Honor please.

The Court: Ladies and gentlemen of the jury, you are to remember the statement I made as to the character of this testimony; that it is taken under that special law which allows [150] one to bring in his adversary and cross-examine him and then gives him the right to contradict him later on, if he chooses.

Direct Examination

By Mr. Margolis:

Q. Mr. Mayer, are you connected with Loew's, Incorporated, the defendant in this case?

A. Yes, sir.

Q. In what capacity?

A. Head of the studio.

Q. Do you have a title in that capacity? What is your title?

A. That is the title.

Q. Head of the studio? A. Yes.

Q. Are you not referred to as the president?

A. No, sir.

Q. I assume that the words "head of the studio" mean precisely what they say? You are the top man of the studio, is that correct?

A. Yes, sir.

Q. And, as the head of the studio, you are the

(Testimony of L. B. Mayer.)

man who has the final say on all policy matters, isn't that correct?

A. Subject to the approval of New York.

Q. But here in Los Angeles you are the man who has the [151] final say on all policy matters?

A. Yes, sir.

Q. And those policy matters include policy with respect to hiring and firing of employees, isn't that correct?

A. Yes, sir.

Q. Incidentally, Mr. Mayer, Loew's, Incorporated, puts out pictures under the name of Metro-Goldwyn-Mayer, isn't that correct?

A. Yes, sir.

Q. And the name Metro-Goldwyn-Mayer is merely a trade name for Loew's, Incorporated?

A. Correct.

Q. So that, when people go to the motion pictures and see pictures under the title of Metro-Goldwyn-Mayer Pictures, they are actually seeing pictures produced by Loew's, Incorporated, the defendant in this case?

A. Yes, sir. [152]

Q. Loew's, Incorporated—I will withdraw that. There exist, do there not, two associations of motion picture producing companies, without going into the specific titles, one of which is generally known as the Eastern Association and one of which is referred to as the Western Association?

A. Yes, sir.

Q. And Loew's, Incorporated, is a member of each of these associations, the Western and the Eastern Associations of Motion Picture Producers?

(Testimony of L. B. Mayer.)

A. Yes, sir.

Q. And Mr. Eric Johnston is the president of both of these associations of motion picture companies, is he not?

A. Yes; he is.

Q. Mr. Mayer, are you acquainted with the plaintiff in this case, Mr. Lester Cole?

A. Yes, sir.

Q. How long have you known him?

A. Approximately about the time he started to work with us.

Q. Would you say that was three and a half years ago or so?

A. I cannot tell you, sir.

Q. And you know, do you not, that Mr. Cole was employed first on a week-to-week or free-lance basis and thereafter [153] under a term contract, with option periods, by Loew's?

A. Yes, sir.

Q. Are you familiar with the pictures for which Mr. Cole has written the screen plays?

A. I believe I am. I think so; yes, sir.

Q. What are those pictures, according to your recollection?

A. Fiesta and Rosy Ridge.

Q. Is that The Romance of Rosy Ridge?

A. The Romance of Rosy Ridge, and High Wall, I think.

Q. He has also written some screen plays for Loew's for pictures which have not yet been produced, is that correct?

A. I am not familiar with that.

(Testimony of L. B. Mayer.) !

Q. You do know, however, that he did write the screen plays for these three screen plays you have mentioned? A. Yes, sir.

Q. And, incidentally, before that, you were also familiar with the fact that Mr. Cole was a writer for the picture industry for many years and had written a great many other screen plays?

A. I knew nothing about that. [154]

* * * *

Q. Have you seen the screen plays written by Mr. Cole for each of these three pictures, which have been produced by Loew's? A. Yes, sir.

Q. I assume that you examine scripts from the standpoint, among others, of determining whether or not those scripts in any conflict with the policies of your company, isn't that correct?

A. I don't know what you mean by that.

Q. Loew's Incorporated, I assume, is interested in putting out pictures containing certain types of subject matter and certain matter of treatment of subject matter and is interested in not turning out pictures containing other kinds of subject matter, isn't that correct? That is, you have certain policies?

A. I don't understand what you are talking about.

The Court: Mr. Mayer, you have a standard at which you aim in motion pictures?

A. Oh, surely, but not that it must be a certain kind of subject. I don't know what he means by that.

Q. (By Mr. Margolis): If you saw anything in a script which, in your opinion, was subversive or Un-American, you would order either the script not to be used or the material [155] to which you object deleted, isn't that correct? A. Promptly.

(Testimony of L. B. Mayer.)

Q. That is what I was talking about when I referred to your having certain policies with respect to certain subject matter and treatment.

The Court: Your question was very complex but I think the witness understands it now.

A. Yes, sir.

Q. (By Mr. Margolis): When you read Mr. Cole's screen plays, I assume that you examined them, as you do all screen plays, to see if they met the standards of Loew's, Incorporated, in the respects I have indicated?

A. I don't examine all of the scripts.

Q. But you did say you examined Mr. Cole's?

A. I didn't say that.

Q. Did you read any of Mr. Cole's scripts?

A. I can't remember. There are too many scripts to read. I can't tell you which ones I read.

Q. Did you see the completed picture?

A. Yes, sir.

Q. And did you find anything in the picture, "Romance of Rosy Ridge", which, in your opinion, by any standard, could be considered subversive or Un-American?

A. No, sir.

Q. Did you see anything in the picture, "High Wall", which, [156] in your opinion, by any standard, could be considered subversive or Un-American?

A. No, sir.

Q. Did you see anything in the picture, "Fiesta", which, in your opinion, by any standard, could be considered subversive or Un-American?

A. No, sir.

The Court: Then I assume the answer you gave

(Testimony of L. B. Mayer.)

that you would have stopped it— A. Yes, sir.

Q. (By Mr. Margolis): But it wasn't necessary to stop any of those pictures or to remove anything from them, was it? A. No, sir.

The Court: I think the time should be brought out when this examination was made with relation to the release time.

Q. (By Mr. Margolis): Did you examine each of these films or view each of these films at the time or before the time or after the time of the respective releases of those pictures?

A. Oh, long before.

The Court: In other words, the examination was for the very purpose of determining whether something should be changed or deleted?

A. Only from the entertainment angle. [157]

Q. (By Mr. Margolis): During the entire period—

The Court: I think that should be explained. I assume you meant there are other cuttings made before the picture is completely assembled, is that correct? A. Yes, sir.

The Court: And this particular view is the view of the final picture as you intended to release it, is that correct?

A. The first time we take it out to see how the audience takes to the complete picture. [158]

And we determine whether there are to be any deletions, any changes, and of course if we saw anything Communistic and so forth, we would be against it.

(Testimony of L. B. Mayer.)

The Court: And that is examined at your private studio?

The Witness: No. We take it up to an audience. It is called the preview.

Mr. Walker: The witness turns his head to address you, your Honor, and then I think it isn't possible for the jury to hear him.

The Court: It is not necessary to turn to me. Just turn to the jury.

Mr. Walker: Your Honor, you understand there is no discourtesy meant to the judge, if he speaks towards you rather than to the jury.

The Court: Maybe he has had experience with some of these administrative committees. They resent it if you at all consider your audience. They resent it if you talk to the audience. I have had experience with them.

Mr. Walker: Don't consider it as a discourtesy—

The Court: That is right. Even if there wasn't a jury, we all face an audience because the lawyers have to hear and the people in the court have to hear, and when we have a jury it is much more important that they hear than I do. If any witness says something I do not hear, I would hesitate to so inform them. Fortunately, my hearing is very good. All right, [159] go ahead.

Q. (By Mr. Margolis): Now, Mr. Mayer, it is a fact, is it not, that as far as you know from the time that Mr. Cole went to work for Loew's until he was suspended by a notice on or about December 3, 1947, that his services as an employee were entirely satisfactory? A. Yes, sir.

(Testimony of L. B. Mayer.)

Mr. Margolis: There is in evidence here—

The Clerk: The reporter has that contract.

Mr. Margolis: I won't take the time to refer to it. Simply to say that there is in evidence here a contract which has an original term of two years with option periods, at the option of Loew's, for two additional two-year periods and an additional one-year period thereafter, which was executed between Loew's and Mr. Cole.

The Witness: Yes.

Q. (By Mr. Margolis): You know generally of that contract, do you not? A. Yes, sir.

Q. You know, too, do you not, that before the first two-year period had expired, and the expiration date would have been I believe November 15, 1947, that before that time came there were certain adjustments made in Mr. Cole's contract?

A. Yes, sir. [160]

Q. You know about that, don't you?

A. Yes, sir.

Q. And were the questions with respect to those adjustments taken up with you prior to the time that they were put into effect? A. Yes, sir.

Q. Now, the effect of these adjustments was, first, to grant Mr. Cole an annual six-week paid vacation which he did not previously have, isn't that so?

A. That I don't recall.

* * * *

[161]

Q. The changes that were made in the contract were changes beneficial to Mr. Cole, giving him added benefits, isn't that true?

(Testimony of L. B. Mayer.)

A. Yes, sir. That was because he was promised that.

Q. He was promised it. What he was promised was that if he did good work for the studio—

A. Yes, sir.

Q. —that the matter of making adjustments in his contract would be considered, isn't that correct?

A. As near as I can recall, there were promises made to him which they later tried to say they didn't, and when I found that there were grounds that they had, I said, "Make good your promises," and they did.

Q. But the promise was, was it not, that if Mr. Cole did good work for the studio—

A. Oh, based on that.

Q. —that his contract would be approved?

A. Always based on that.

Q. Yes, and as far as you knew, as the head of the studio, Mr. Cole had done excellent work for the studio?

A. Yes, sir.

Q. And was entitled to this adjustment?

A. It was so reported to us.

The Court: You weren't going to allow the company to [162] welch on the contract, is that correct?

The Witness: Yes, sir.

The Court: That is right.

The Witness: An oral promise is just as good as a written one.

Q. (By Mr. Margolis): Now, Mr. Mayer, at the same time that the adjustments were made in the contract, Mr. Cole's first option period, the first option period of two years, was taken up by the

(Testimony of L. B. Mayer.)

company somewhat in advance of the date when it ordinarily would have come up, is that right?

A. That I do not remember.

Q. But you know that the option period was taken up at that time?

A. I think it was. My memory serves me that it was.

Q. Now, before the time that that option period was taken up, did you have knowledge of the fact that it was claimed that certain employees of the company were alleged to be Communists and that there was a demand being made by representatives of the House Committee on Un-American Activities that they should be fired?

A. Oh, I have heard lots of that going on for some time.

Q. And you had heard that and knew of that before the time that the option was taken up, isn't that a fact?

A. Oh, no, I don't think so. [163]

Mr. Margolis: Well—

A. (Continuing): Not in relation to Mr. Cole. Not in relation to that last hearing.

Q. (By Mr. Margolis): You had not heard that with respect to Mr. Cole?

A. No, sir.

Mr. Margolis: Maybe we can refresh your recollection.

The Witness: Maybe so.

Mr. Margolis: —as we go along.

The Witness: There is so much confusion about it.

Q. (By Mr. Margolis): Nevertheless, you had

(Testimony of L. B. Mayer.)

heard this at least generally about some people employed by you? A. Yes.

Q. And isn't it a fact that you stated the policy of the company to be just to pay no attention to those things, that you were concerned only with the conduct of motion pictures and not with the policies of your employees?

A. At that time, yes, sir.

Q. Do you recall that some time in 1947 you were visited by two men named H. A. Smith and A. B. Leckie? A. Yes, sir.

Q. Do you remember approximately the date when they called on you? A. No.

Q. Well, without trying to fix the exact date, we shall [164] try to fix it with reference to events.

Do you remember that in May of 1947 the House Committee on Un-American Activities conducted closed hearings here at Los Angeles, which hearings nevertheless received a lot of publicity?

A. I know the hearings. I don't know what date, but I know the hearings.

Q. The ones that were conducted at Los Angeles.

A. In Los Angeles, yes.

Q. You remember, also, that in the same year, the date being October, 1947, the House Committee on Un-American Activities conducted open hearings in the city of Washington?

A. In Washington; yes, sir.

Q. Now, with respect to these two hearings, the closed hearings in Los Angeles in early 1947 and the open hearings in Washington late in 1947, when did these two men call on you?

(Testimony of L. B. Mayer.)

A. In between the two, I believe, I believe—

Q. Now, you knew, did you not, that before these two men called on you, that they had been to see Mr. Mannix?

A. Yes, sir.

Q. Incidentally, that is Mr. E. J. Mannix?

A. Yes, sir.

Q. And what was his position with the company?

A. General manager. [165]

Q. And he held that position at the time indicated?

A. Yes, sir.

Q. Now, before the time that these members of the Committee—I will withdraw that.

Before the time that these representatives of the Committee called upon you, you had a conversation, did you not, with Mr. Mannix concerning the prior conversations with these two representatives of the Committee?

A. I think he came in to see me about it and talked to me about it.

Q. Then he told you about their having called on him first?

A. Yes, sir.

Q. Now, did he at any time tell you what the Committee members, generally what the Committee members had said to him and what position he had taken in his conversations with the—I want to withdraw that—they are not Committee members—

A. Investigators.

Q. (Continuing): —the Committee investigators. I will rephrase the question.

Did he tell you what the Committee investigators had said to him and what position he had taken in that conversation with those investigators?

(Testimony of L. B. Mayer.)

A. I can't recall. He talked a great deal about it and [166] summed up that they wanted to see me, but I can't recall exactly what phases of his talk with them he related to me.

Q. Well, maybe I can help you out. Do you remember his telling you the following, with respect to his conversation with the two investigators, that he said in substance to the investigators, "What do you want me for? I can't get you any publicity. Leave me out. Mr. Thomas wants publicity. I think it is a witch hunt. I think it is unfair. I don't think you are carrying on honestly. I don't think you are doing anybody any good in the way you are doing." Do you remember that in substance?

A. No. He never told me anything like that.

The Court: Q. Well, do you remember the substance of his conversation with these investigators as he reported it to you?

A. The thing that it just raised in my mind is that he was pressing me that I should see them and urged me to see them. But as to what he had said to them, I can't recall now, to my memory, what he told me. He talked a lot about it.

The Court: All right.

Mr. Margolis: Well, maybe some other matters will refresh your recollection, Mr. Mayer.

Q. Do you remember his telling you that he told the committee investigators that if the industry was wrong, it should be investigated, but that he didn't think that the [167] industry was wrong and that he thought the committee was just using a shoddy way of getting publicity?

(Testimony of L. B. Mayer.)

A. I don't recall him saying that to me and it is all mixed up in my mind as to what he told me and what they did with me when they came in to see me, so I can't really separate it.

Q. You may yourself have said some of these things, is that right?

A. Yes. I may have said it. I can't remember.

Q. You may have said it. Do you remember his telling you that they had asked—I will withdraw that.

Do you remember his telling you that the committee investigators had inquired about some employees and that they had inquired specifically about Lester Cole?

A. I don't recall that, Mr. Margolis.

Q. Do you recall his saying to you that they had demanded that Mr. Cole be discharged on the ground that they claimed Mr. Cole was a Communist?

A. I don't think he told me. He may have, but I don't think so. I think he would say that, but I don't remember him saying it to me. I knew what his attitude was.

Q. And this at least reflected his attitude, is that right?

A. I would think so, yes.

Q. (By Mr. Margolis): Well, the last question isn't [168] really on an attitude on his part. But his attitude was and he may have said this to you, that he told the committee, "I don't give a damn whether they are Communists or not," is that right?

A. It is possible. I don't know.

Q. But that accurately reflected his attitude as you understood it?

A. Yes, sir.

Q. And when he told you that that was his at-

(Testimony of L. B. Mayer.)

titude or when you understood that that was his attitude, what did you say to him about it?

A. I said it is up to the Congress to give us a way out, that there is no Communism in our pictures, and that is all that bothered me and interested me; let Congress take care of that.

The Court: Q. Would you amplify a little more what you told him at that time, if you remember it?

A. As to what I told the investigators or Mr. Mannix?

Q. Mr. Mannix, first.

A. Oh, I can't recall what I said to him.

That isn't the question you asked me, is it?

Mr. Margolis: Yes.

The Witness: That is as to what I said to Mannix?

Mr. Margolis: Yes, as to what you said to Mannix.

A. Oh, I don't know. I say that was my state of mind [169] about the whole issue.

That isn't the question you asked me, is it?

The Court: Q. But to whom did you communicate that state of mind?

A. Both to Mannix and the investigators and to all our staff, and all discussions when an issue came up.

Q. What was the effect of it?

A. The effect of it was that they had not proven they were Communists, that was at least our conclusions; all we are responsible for is that no Communism gets into our pictures and they can't get into our pictures. Too many of us are reading the

(Testimony of L. B. Mayer.)

scripts and we would throw it out if it was there. And outside of that, let Congress make a law by which they can get rid of people they call Communists.

The Court: Q. In other words, you were not interested as a result of any Communistic thought in any pictures which you sold to the public?

A. Yes, sir, at that time, that is right.

Q. You were of the view, as you expressed to them, that your pictures did not contain any such matter so far as you could tell from examining the pictures to which your attention had been directed?

A. Yes, sir.

Q. Or any other pictures?

A. That is right.

Q. Consciously? [170]

A. That is right.

Q. And knowingly?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Margolis): Incidentally, Mr. Mayer, so that we can be entirely clear, when I ask you about a conversation I obviously do not expect you to recall the exact words of any conversation, but the substance of the idea which you expressed or which others expressed in the conversation. Now, I want to direct your attention, now, to a conversation with Mr. Smith and Mr. Leckie. By the way, where did you meet?

A. In my office, in Culver City.

Q. That is out at the Metro-Goldwyn-Mayer Studio?

A. Yes, sir.

Q. And was there one meeting or more than one meeting, so far as you can recall?

(Testimony of L. B. Mayer.)

A. I know of one. There may have been another one, now. I don't recall when exactly.

Q. Was there anyone else present during the one or two conversations—

A. No, I don't think so.

Q. Besides yourself and these two gentlemen?

A. I think that is all.

Mr. Margolis: My associate has suggested that the manner [171] in which it might be possible for us to fix a little bit more accurately the date of that conversation with Mr. Smith and Mr. Leckie—

Q. You yourself were subpoenaed to appear as a witness at the Washington hearings?

A. Yes, sir.

Q. Which were held in October, 1947?

A. Yes, sir.

Q. Now, do you know what date you were subpoenaed? A. No, sir.

Q. Do you know when it was with respect to the hearings, how long before? A. No, I don't.

Q. Do you know when it was?

Mr. Selvin: September 24th, we can probably stipulate to that.

Mr. Margolis: Can we stipulate that it was on or about the 25th of September, 1947?

Mr. Selvin: Yes.

Mr. Margolis: Q. That was almost four weeks, roughly, before the hearing started. Would that fit in with your recollection? A. It could be.

Q. Now, it is a fact, is it not, that your conversation with Mr. Smith and Mr. Leckie took place before you [172] were subpoenaed to Washington?

(Testimony of L. B. Mayer.)

A. Yes, sir.

Q. Do you remember how long before?

A. No, sir.

Q. Well, now, I don't want to tie you down in exact terms, but was it several weeks or several months?

A. I can't tell you what time. It was sometime before that.

Q. Would you say at least a couple of weeks before?

A. I am afraid to say. I just can't place the dates of the times. I knew they came in with a subpoena and I argued with them about the subpoena but got nowhere with them.

Q. They had talked with you before you received the subpoena?

A. They said they were going to subpoena me. I said, "What am I going to tell you after I get it?" My brother was dying at the time. I wanted to give them Mannix, who knew all about it, and they wouldn't take him. They wanted me.

Q. All right, now, I wonder if you would give us to the best of your recollection the substance of the conversation or conversations which you had with Mr. Smith and Mr. Leckie.

A. It is going to be very tough to try to think out what we argued.

Q. Well, give us it to the best of your recollection. [173]

A. Well, they argued that we were infested with Communists and we ought to clean house, if we don't,

(Testimony of L. B. Mayer.)

Congress will and public opinion will, and so forth, they were after me.

And I said that I am not going to fire men on the assumption that they are Communists, when they have done nothing Communistic that I can find and no one has proven they are Communists, and they ought to pass a law telling us how to take care of a situation like that. I don't know what law to fire a Communist on. And he claimed that one of our pictures had Communism.

I said I will bet him all the money he can raise that there is no Communism; that he can't make good.

Well, I told him to see the picture. So he saw the picture twice, and so forth, and he couldn't sustain it, that there was any Communism.

The Court: Q. Will you mention the picture? I think it has already been mentioned.

A. "Song of Russia."

Q. (By Mr. Margolis): Who wrote that picture?

A. I can't recall.

Q. In any event, it was not Lester Cole?

A. No, sir, no. And there was no Communism in it.

Q. Isn't it also a fact that in that conversation, first of all, there was a very heated discussion between [174] yourself and these men?

A. Very, very.

Q. You were in strong disagreement with them, isn't that correct? A. Correct.

Q. And isn't it also true that during the conversation, you insisted that you just didn't care, to use

(Testimony of L. B. Mayer.)

your words, you didn't give a damn whether they were Communists or not?

A. I did not say that.

Q. (Continuing): So long as nothing got in the pictures? A. I never did say that.

Q. You never did say that?

A. I never said that, to my knowledge. I kept insisting that—

The Court: Q. You don't use the strong words that Mr. Mannix is in the habit of using?

A. Not usually, your Honor.

Q. (By Mr. Margolis): Although this was a very heated discussion?

A. Yes, very heated. They spoke loud enough. They heard me.

My position was that I would not fire anybody just because someone said someone was a Communist or words to that effect. That was my attitude, that so long as there was no [175] Communism in our pictures, and so far as I was concerned none could get in and it was up to the Congress to pass laws how to handle that thing, and he says, "Supposing we prove to you—"

I said, "What kind of proof are you going to give me? Are you going to show me cards?" I said, "I can't pass on it. Show it to our lawyers. Tell them what to do with your cards."

That is the way we argued back and forth, and he claimed public opinion was going to do something with us if we did not move, and the press and the Congress when it convenes, and I said, I kept in-

(Testimony of L. B. Mayer.)

sisting that Congress pass a law and tell us how to do it.

That is really all that went on in the argument.

Mr. Margolis: Incidentally, I want to apologize, Mr. Mayer. I have been looking at your deposition and I misread the word "darn", having just finished Mr. Mannix's deposition, I read it to mean something else.

Q. But to refresh your recollection a little further and a little more accurately this time, isn't it true that you insisted that you didn't give a darn whether the men were Communists or not, so long as nothing did get into the picture, and that nothing did get into the picture?

A. I don't recall whether I had said that I didn't give a darn whether a man is a Communist, because I am so [176] bitterly opposed to Communism that I don't see how I could say I did not give a darn.

Q. You remember, Mr. Mayer, that you gave a deposition in this matter? A. Yes, sir.

Q. And your deposition, to refresh your memory, was taken before Sylvia Prager, a Notary Public of Los Angeles County, at Los Angeles, California, on March 10, 1948.

A. No, I don't remember the exact date.

Q. But it was on or about that time?

A. I think that is right.

The Court: That is on page 54. I think counsel will probably stipulate that certain questions were asked and that certain answers were given, and in that manner you can found the question now asked Mr. Mayer.

(Testimony of L. B. Mayer.)

Mr. Selvin: We undoubtedly will stipulate. I will say that I have no objection to the deposition being used, but I will say further that it has not been read over and corrected and signed by the witness. I would say that it was a very bad typographical job, and there are portions that were garbled.

Mr. Margolis: There is nothing garbled in this portion I am about to refer to at this time.

Q. You were sworn to testify under oath, you will remember? A. Yes.

* * * *

[178]

Q. (By Mr. Margolis): Do you remember at that time testifying with respect to this conversation?

A. I don't remember all the things I said. It was a heated discussion.

Q. Did you not give this answer: "I insisted that I didn't give a darn whether he was a Communist or not, so long as nothing got into the pictures; that threats of the public are not going to allow this to go on, et cetera—infiltration is what he used—he used the word." Do you remember so testifying?

A. I may have. I don't say I did not.

The Court: Now will counsel stipulate—Mr. Selvin, you will stipulate that that occurred? [179]

Mr. Selvin: I will stipulate that occurs in the transcript but I will not stipulate, your Honor, that it is Mr. Mayer's testimony, because obviously it was garbled. There are some words omitted in the transcript.

Mr. Margolis: I think we can leave the question to the jury.

The Court: No, it is a question for Mr. Mayer.

(Testimony of L. B. Mayer.)

Mr. Mayer, you say you do not remember giving the answer to the question in that form, or what?

A. I don't remember what I said. Whether I said it that way, I don't recall.

* * * *

[180]

Mr. Margolis: I think it is necessary to ask a preliminary question. I will come back to that in a moment, your Honor.

The Court: All right.

Q. (By Mr. Margolis): Isn't it a fact that during this conversation with Mr. Smith and Mr. Leckie, that they named several persons whom they alleged were Communists, isn't that correct?

A. I think they did. I don't remember who.

Q. And two of the persons that they named, that they claimed were Communists, were Mr. Cole and Mr. Trumbo, is that correct? A. Yes.

The Court: I think we could state the first name of Mr. Trumbo.

Mr. Selvin: Mr. Dalton Trumbo.

The Witness: Mr. Dalton Trumbo, the writer.

The Court: And there is also a Taylor Trumbo, city editor of The Times, who used to be The Times' man of the court house and I want the jury to know that he doesn't mean him.

Q. (By Mr. Margolis): We refer to the Mr. Dalton Trumbo. A. Right. [183]

Q. Who was employed by you as a writer, isn't that correct? A. Yes, sir.

The Court: I will give him this copy. Stay where you are, I prefer counsel to stay away from witnesses. Sometimes it makes them nervous. Not that

(Testimony of L. B. Mayer.)

Mr. Mayer will be nervous, but some witnesses get nervous and I try to avoid that.

That is the question, right there. (Indicating in transcript.)

The Witness: Right here?

The Court: Yes.

The Witness: Shall I read it?

The Court: Just read it to yourself.

Mr. Margolis: Just read it to yourself.

The Court: Don't read it aloud. Just read it to yourself.

Mr. Margolis: Just read the portion that the judge has suggested.

The Witness: Yes. I remember that now, yes.

Q. (By Mr. Margolis): You remember, now, that you did so testify, is that correct? A. Yes.

Q. Now, at that time, you had in your employ, in the employ of Loew's, Incorporated, a man by the name of [184] McGuinness, did you not, James K. McGuinness? A. Yes.

Q. Employed in some kind of an executive capacity? A. Yes, sir.

Q. Now, at or about the same time that you were subpoenaed, and Mr. Cole was subpoenaed to appear before the committee in Washington, Mr. James K. McGuinness was subpoenaed to appear before that committee? A. I think so, yes. I know he was.

Q. And it is a fact, is it not, that before he went to Washington you had a conversation with Mr. McGuinness concerning the matter of his testimony before the committee in Washington?

A. Yes, sir.

(Testimony of L. B. Mayer.)

Q. And it is also a fact—

The Witness: Not in connection with Washington. In connection with the Los Angeles one.

Q. (By Mr. Margolis): Oh, in connection with the Los Angeles testimony. He had also testified in the closed hearings which had been held?

A. I don't know, but he was supposed to be. He told me he was going to be. That is what I talked to him about.

Q. Did you talk with him with respect to the Washington hearing? [185]

A. No, sir.

Q. Well, at the time that you talked to him with respect to his appearing at certain hearings, you made suggestions or you indicated how you felt about the kind of testimony that should be given before the committee, did you not?

A. I told them how I felt about the thing.

Q. And he told you that he agreed with you in part and disagreed with you in part and indicated that he could not go along with your view on the testimony completely, isn't that a fact?

A. I don't recall what his answer was. I don't think he had such conversation. He listened to what I said and he did not say much.

Q. Well, do you recall just this much: That he disagreed with you on some things?

A. I don't remember.

* * * *

[186]

Q. (By Mr. Margolis): Is Mr. McGuinness still with the studio?

A. Yes, sir.

Q. He has never been suspended or fired, has he?

A. No, sir.

* * * *

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(Testimony of L. B. Mayer.)

Q. (By Mr. Margolis): I direct your attention to that deposition, page 4, line 24, to and including page 5, line 12.

The Court: Just read it to yourself, including this question and answer.

A. I remember that conversation.

Q. (By Mr. Margolis): In that conversation, it is true, is it not, that you said to him that, if you were called upon to testify, you would still put it up to the Congress to have laws passed by which to govern business how to handle that which they are all complaining about, and it wasn't the industry's job to do it, and that Mr. McGinnis listened to you and said in some things he agreed with you and some things he did not agree with you, is that correct?

A. That is what it says there but I don't remember whether those are the words or not.

The Court: Insofar as you remember, that was your position and you have stated it from the witness stand, haven't you?

A. Yes, sir. That is why I recognize it.

The Court: That was your position at the time?

A. Yes, sir. That is why I recognize it.

Q. (By Mr. Margolis): It is a fact, is it not, that, pursuant to the subpoena which was served upon you, you appeared in the hearings in Washington and you testified before the Committee?

A. Yes, sir.

* * * *

[189]

Q. You went to the meeting in New York, which

(Testimony of L. B. Mayer.)

was held after the hearings in Washington were completed? A. Yes, sir.

Q. And I think the date was November 25, 1947. Isn't that correct? And it was held at the Waldorf-Astoria?

A. Yes; as far as I know about the date, that is approximately it. [190]

* * * *

Q. (By Mr. Margolis): Let me ask you this. Isn't it a fact that at the time you left for New York, your attitude was that which you previously had, that, if anything was to be done about this subject, Congress should pass a law; that you were not going to be the one who was going to judge men, and that you were not afraid of Communists; that nothing was getting into your pictures which was Communistic; and that attitude you still had at the time you left for New York, isn't that so?

A. Yes, sir.

Q. And this was on or about November 22 or 23, 1947, a [191] few days before that meeting?

A. Approximately.

Q. Then this meeting was held in New York on November 25 and 26, a Monday and a Tuesday, at the Waldorf-Astoria? You remember that, don't you?

A. I remember the meeting but I don't know what dates it was.

Q. And, without going into the names, representatives of most of the big studios were there, is that correct? A. Yes, sir.

(Testimony of L. B. Mayer.)

Q. Mr. Johnston, the president of both Associations, was there? A. Yes, sir.

Q. As a matter of fact, he persided over the meeting, did he not? A. I think he did.

Q. And lots of attorneys were there representing the various parties? A. Yes, sir.

Q. At that meeting a proposal was made, was it not, to the effect that persons who were proved to be Communists should not be employed and that any of the men who had failed to answer questions before the House Committee on Un-American Activities should be suspended or discharged? Substantially that kind of a proposal was made, isn't that correct?

A. Yes, sir.

Q. And various persons at that meeting spoke their minds about that proposal? A. Yes, sir.

Q. And you were one of those who spoke your mind about the proposal? A. Yes, sir.

Q. And at that meeting you stated that your feeling had always been and was at that time that with respect to this subject matter Congress should give us a law, and that you didn't want to be the one to try to judge men; that you were not afraid of Communists, and that nothing was getting in your pictures that was Communistic? Isn't that what you said at this meeting?

A. I can't recall what I said at the meeting. My state of mind when I left here, in regard to Communists, was as I have said. But this hearing in Washington upset the appplecart.

Q. I am asking you now what you said at the meeting. A. I can't recall.

(Testimony of L. B. Mayer.)

Q. Didn't you say that, in substance?

A. I think I would have said it because that is what I believed and felt.

Q. And it was after that New York meeting, after you came back from that New York meeting, that Mr. Cole was suspended [193] pursuant to the notice which is in evidence here as Exhibit 1? You don't know about that but counsel knows that is the number. It was after that meeting that he was suspended?

A. I believe so.

Q. And it was pursuant to and as a result of that policy that was adopted in New York that he was suspended, isn't that correct?

A. Our officers in New York felt we should do something about the men who wouldn't answer.

Q. Isn't it a fact that your action that was taken was taken as a result of and pursuant to the policy which was adopted on November 26, 1947, at this meeting in New York City, at the Waldorf-Astoria Hotel?

A. That was agreed upon at that meeting but my instructions came from our own officers.

Q. To follow out that policy, isn't that correct?

A. They said, "We are not firing him. We are suspending him until he is proven guilty or innocent of contempt."

Q. But their instructions were given pursuant to that policy, which Loew's was a party to, and in order to follow out and effectuate the policy at that meeting, isn't that correct?

A. It was given at that meeting.

(Testimony of L. B. Mayer.)

Q. And in order to put that policy into effect, isn't [194] that true?

A. I was ordered to do it and we had it done.

The Court: Let's leave the word "policy" out because it may have certain connotations. A line of action was adopted? A. Yes, sir.

The Court: And, as a result of that, you were instructed to take certain actions, one of which was the sending of this letter, is that correct?

A. Yes, sir.

The Court: I don't mean you. I mean the corporation, represented by the officers in charge here, Mr. Mannix and yourself. A. Yes, sir.

The Court: And what is the name of the gentleman who signed the notice?

Mr. Katz: Louis K. Sidney.

The Court: And Louis K. Sidney, is that correct?

A. Yes, sir.

Q. (By Mr. Margolis): Mr. Mayer, at the time that the notice of suspension was given to Mr. Cole, there were some of his pictures, for which he had written the screen plays, that were being publicly exhibited in various motion picture houses throughout the United States, isn't that so?

A. Yes, sir. [195]

Q. And it is a fact, is it not, that, to your knowledge, none of those pictures were being picketed or any other public action being taken against any of those pictures for which he had written the screen plays? A. None that I know of.

Q. And those pictures were being exhibited throughout the United States, with a title card in-

(Testimony of L. B. Mayer.)

dicating Lester Cole was the author of the screen plays? A. He was on with other credits.

Q. He was on with other stars and "Metro-Goldwyn-Mayer" and so forth? A. Yes, sir.

Q. Before the time this notice of suspension was given to Lester Cole, you didn't make any check to find out how the pictures for which he had written the screen plays were doing at the box office, did you?

A. No, sir.

Q. As a matter of fact, there wasn't even time to make that kind of a check, was there?

A. Oh, yes.

Q. Prior to the time that Mr. Cole was suspended, you had received several letters, or a number of letters, with respect to what had occurred before the House Committee on Un-American Activities, isn't that correct?

A. I think we had a lot of letters.

Q. A lot, did you say? [196]

A. Well, quite a number. I don't recall how many.

Q. Isn't it a fact that you had had just a few, that you had received just a few of such letters, Mr. Mayer?

A. Well, if that will please you better, a few.

Q. Mr. Mayer, please, I don't want you to please me.

A. I can't tell you. You are telling me. So what can I do? I don't remember whether it was a big lot or a little lot but a lot of letters came in. We had letters about that.

The Court: What do you mean by a "lot"? If I received 50 letters, I think it would be a lot, but, if

(Testimony of L. B. Mayer.)

one of your motion picture stars received 50, she might be insulted. So we don't know what you mean by a "lot".

A. Well, your Honor, we would get letters today, say half a dozen, and next time we would get two or three, and then get a dozen. And there would be one or two say that he has the right to be a Communist but most of them, three-quarters or nine-tenths of them, were all condemning us for having Communists in pictures.

Q. You can't tell in numbers? A. No, sir.

Q. Fifty or a hundred or less?

A. No, sir. There was lots of excitement going on at the time.

Q. (By Mr. Margolis): As a matter of fact, what you did with the letters was you thought so little of them that [197] you just tore them up and threw them in the waste paper basket, isn't that correct? A. I didn't tear anything up.

Q. Did you throw anything into the wastepaper basket? A. I don't know.

Q. Did you throw them away?

A. I don't know. I don't know what we did with them. I would like to.

Q. Let's, again, refer to your deposition, the one on March 10, 1948. I want to direct your attention to page 35, beginning at line 19, and I wonder if your Honor would be so kind as to let us have a copy of the deposition for the witness.

The Court: Yes. It is right in front of him.

A. Is it page 35?

Q. (By Mr. Margolis): Page 35.

(Testimony of L. B. Mayer.)

A. Line what?

Q. Line 19. Read over to say line 3 on page 36 or a little further than that.

A. Yes, sir; I see what I have said.

Q. Doesn't that refresh your recollection and isn't it the fact that you received a few letters and those letters you received you threw away?

A. That is what it says here. I don't recall what I did but, if I said so here, I must have done it. [198]

Q. Your recollection was fresher six months ago, at the time you gave the deposition, than it is now, is that right?

A. Yes; it was. You bet.

Q. It is a fact, is it not, Mr. Mayer, that, since Lester Cole has been suspended, pictures for which he wrote the screen plays have continued to be sold or leased or rented by Loew's, Incorporated?

A. Yes, sir.

Q. And by Metro-Goldwyn-Mayer, to various theatres throughout the United States and, in fact, throughout the world?

A. Yes, sir.

Q. And Metro-Goldwyn-Mayer and Loew's, Incorporated, have continued to receive income from those pictures, from their exhibition to the general public throughout the United States and world, isn't that so?

A. Yes, sir.

Q. And this has applied to the picture *High Wall*, which has done very well, isn't that so?

A. Yes, sir; fairly well.

Q. And it has applied to the picture *Fiesta*?

A. Yes, sir.

(Testimony of L. B. Mayer.)

Q. And, as I remember, the picture *Romance of Rosy Ridge* had been released a little earlier. Am I right? [199]

A. I can't tell you that.

Q. At any rate, you continued to exhibit *Romance of Rosy Ridge* and continued to receive money from it, and those pictures continued to have on them the title card showing that Lester Cole was the screen writer of those pictures?

A. Yes, sir.

Mr. Margolis: You may cross-examine. [200]

* * * *

Cross-Examination

By Mr. Walker:

Q. Mr. Mayer, you stated that you were the head of the studio known as Metro-Goldwyn-Mayer. That is correct, is it not? A. Yes, sir.

Q. You have been engaged in the motion picture business as a producer for how long a period of time?

A. As a producer about 28 or 30 years.

Q. And you have been the head of the studio at Metro-Goldwyn-Mayer for approximately how long? A. About 25 years.

Q. Approximately 25 years?

A. Yes, sir.

Q. The primary business of the studio, which we know [201] as Metro-Goldwyn-Mayer, is actual production of motion pictures, is it not?

A. Yes, sir.

(Testimony of L. B. Mayer.)

Q. And, when those pictures have been produced, what is done with the pictures?

A. They are sent to New York.

Q. And what is the ultimate disposition of the pictures?

A. New York distributes them all over the world through our branch offices.

Q. Does Loew's, Incorporated, itself exhibit all of the pictures which it makes?

A. It exhibits them in some theatres and then sells the other theatres.

Q. As I understand you, in some instances the pictures are exhibited in your own theatres and in other cases they are distributed to other exhibitors who, in turn, show them to the public, is that correct?

A. We show our pictures in our own theatres and sell to all the other theatres where we haven't got theatres.

Q. So that, with a few exceptions, where a special type of picture is made for some particular purpose, as far as your commercial operation is concerned, your pictures eventually, if they are produced at all, are exhibited to the public, is that correct?

A. Yes, sir. [202]

Q. The organization which makes up Metro-Goldwyn-Mayer consists of a large number of people, does it not?

A. Yes, sir.

Q. And people who are engaged in different parts of the world?

A. Yes, sir.

Q. In producing motion pictures?

(Testimony of L. B. Mayer.)

A. Yes, sir.

Q. And amongst those people who take a part in the making of motion pictures are the people that you call writers? A. Yes, sir.

Q. The writers of screen plays or scenarios, is that correct? A. Yes, sir.

Q. How important a part does the writer have in the making of a successful picture?

A. A great deal.

Q. Is it possible for you to produce a successful picture unless you have a proper screen play?

A. I don't think so.

Q. When I say a proper screen play, I mean a good screen play.

A. That is what it is based on.

Q. During your experience in the industry as a [203] producer have the good screen writers been overly numerous or relatively scarce or what?

A. Very scarce at all times.

Q. I take it, then, that it would be a fair statement that, if you have what you regard as a good writer, you are desirous of keeping him if you can?

* * * *

Q. What is your attitude towards losing the services of a good writer who is in your employ?

* * * *

A. We struggle hard to hold the good ones.

Q. (By Mr. Walker): You were asked a number of questions in regard to your examination of scripts and I understood you to say that you did

(Testimony of L. B. Mayer.)

read some scripts but that it was not possible for you to tell at this time just what scripts you may or may not have personally read. That is correct, is it not? A. Yes, sir.

Q. Let me ask you, what different departments of the studio do make a business of reading scripts before the picture goes into final production?

A. We have the editors; we have the chief executive over the unit that is producing this picture, and then there is Mr. Thau, who is my assistant on casting, who reads it. If there is any controversy as to the quality or the subject matter, as to being commercial and popular, it is then given to me to read.

Q. And the particular producer on the picture——

A. He hasn't the last say. He has the direction of the development and the writer works under direction and then, eventually, it goes to the chief executive and the editors.

Q. What about the director?

A. He comes in when we have assigned it to him and he wants changes, which is often—most always.

Q. Do I understand that the director of that particular [206] picture also reads the script?

A. Yes, sir. He has to.

Q. So that, aside from any question of scripts that you, yourself, may or may not have read, every script is subject to review and examination by the people that you have mentioned?

(Testimony of L. B. Mayer.)

A. Yes, sir.

The Court: I happen to know what it is called but will you state for the benefit of the jury what that final script that you finally put your approval on is called?

A. It is called the final script we are going to shoot.

The Court: Is it called the shooting script?

A. Yes, sir, or the final shooting script.

The Court: By "shooting," of course, you mean the photographing?

A. Yes, sir. We call photographing shooting.

The Court: Go ahead.

Q. (By Mr. Walker): Did you have a conversation with Mr. Cole—in fact, I think you have so testified—at or about the time or shortly before the time that you had this interview with the two investigators who have been named as Mr. Smith and Mr. Leckie?

A. A long time before; some time before.

Q. I wish you would give us that conversation as nearly as you can recall it, Mr. Mayer. I understand that you can't [207] reproduce the exact words that each of you used but give it to the extent that you can. I wish you would reproduce for us the conversation that you had with Mr. Cole on that occasion.

A. I asked him——

Q. May I interrupt you before you start on that and ask you whether or not the interview with

(Testimony of L. B. Mayer.)

Mr. Cole was one which you arranged or one which Mr. Cole sought?

A. My nephew, Mr. Cummings, wanted me to talk with him because he had great faith in his ability and he was a fine worker, and I wanted to talk with him and tell him that I would like to have him develop into a producing writer because of the reports I had had as to his capabilities and possibilities. And I said, "Why do you do things that they brand you a Communist?" And he said, "I am not a Communist." "Well," I says, "you must be doing something because they keep on saying so." And he said, "Well, Mr. Mayer, I was born very poor, on the East Side, and saw much suffering and hunger and, whenever they talk about the underprivileged or mention it, I usually run off at the mouth and get very excited, and I suppose that is why they call me a Communist." I said, "I had poverty; I was born in poverty. Look where I sit now. That is what you can get under the American system." He went on and told me the story about his father, who had been a very rabid and active Socialist. He was a tie cutter, [208] cut men's ties, designed ties. And his mother couldn't stand much more one time and they were finally divorced, and he got away and he started up in Baltimore; got married again and had his own shop. And then, when Lester got somewhere in life, he went to visit his father. And his father had other children by his second wife. And his father selected 12 of the best ties he had, and Les-

(Testimony of L. B. Mayer.)

ter began to look for the union label, and he said, "Well, my son, unions are no good for small plants; only for big plants." And he laughed at that to think that this rabid Socialist—we were discussing about its effect. And one day I said, "Lester, if this keeps on being said about you——" he was impressed and I was impressed with his desire at that time to get out of it. He said, "I don't know how you can get out of it." I said, "Disavow it is the only way I know." He was very nice and I was very impressed with the possibilities of this man if this thing wasn't agitated constantly that he was a Communist. And that is about the gist of the conversation and he left me.

The Court: Did you fix the time, Mr. Walker? So try to fix the time. [209]

Mr. Walker: I think Mr. Mayer stated on his direct examination that he could not fix the time with any degree of certainty, but I will ask him this for the purpose of limiting the period during which the conversation took place:

Q. Do you recall whether this conversation took place at the first and closed hearing that was held by the Un American Activities Committee here at Los Angeles?

A. It could have been. I can't remember.

The Court: All right. Go ahead. I thought perhaps that by now you could fix it with some definiteness.

The Witness: I would in a moment, your Honor.

The Court: Go ahead.

(Testimony of L. B. Mayer.)

Q. (By Mr. Walker): Do you recall whether it occurred prior to the time when his contract was revised?

A. I don't even remember that.

Q. Was there any discussion in this conversation with Mr. Cole in regard to the revision of his contract, as far as you recall?

A. No, sir.

Q. Do you know whether this occurred before the subpoena was served for the hearing back in Washington?

A. Oh, I think it was—I know it was.

Q. Now, do you recall whether or not you had any other conversation with Mr. Cole, between the conversation to which you have now referred and the hearing back at Washington? [210]

A. I don't recall any. I may have, but I don't recall it.

Q. Well, if there was any other conversation, you have no recollection of it at this time?

A. No, I have not. No.

Q. During the course of that conversation, did you have any discussion at all with Mr. Cole with reference to what his testimony was going to be before the committee at Washington at the hearing in October?

A. I never discussed that with him..

* * * *

Q. Mr. Mayer, you have recalled the fact that there was a closed hearing held in Los Angeles, or as they refer to it, Hollywood, and for the declared

(Testimony of L. B. Mayer.)

purpose of investigating the infiltration of Communism in the motion picture industry? [211]

A. Yes, sir.

Q. What was your observation as to any publicity that that hearing received?

A. I don't know what you mean by that.

Q. Was there any publicity in respect to the fact——

A. There was some.

Q. ——that that hearing was being held?

A. Yes, sir.

Q. And what was the nature of that publicity?

A. Well, it was all about the infiltration of Communists into the industry, they were going to clean them out and they were going to name a lot of names, and so forth, but after they left Los Angeles, they promised, so I understand, each one would not be made public, it would be behind closed doors and the press would be excluded.

Q. Where did you get this information that there was such a hearing taking place?

A. In the press.

Q. From the press? A. Yes.

Q. And was it a subject of discussion among the people whom you came in contact with?

A. Yes.

Q. That is the information I am seeking.

A. Yes, sir. [212]

Q. Now, at the time that Mr. Smith and Mr. Leckie were out here as investigators in connection with this particular investigation to which we have referred, was any publicity through the press or

(Testimony of L. B. Mayer.)

otherwise given to the fact that they were here and that they were making an investigation in connection with the investigation by the Un-American Activities Committee?

A. I don't remember whether they were named, but I knew the committee was there to do it.

Q. I don't think I have made myself clear. At the time they came out and were here making their investigation, did anything appear in the newspapers or was it a matter of discussion that these investigators were here seeing various people?

A. Yes, discussions.

Q. Now, when it was announced, as I assume it was, or when it became known, that there was to be a hearing in Washington by the Un-American Activities Committee for the purpose of investigating the infiltration of Communism in the motion picture industry, in October, 1947, was there any publicity in regard to that fact?

A. Oh, yes, sure, plenty of it.

Q. All right. And where did that publicity take place? What were the media of that publicity?

A. In Newspapers. [213]

Q. Was there discussion?

A. And people in our industry discussed it and talked about it.

Q. Now, directing your attention to the matter concerning which you testified on your direct examination, am I correct in my understanding that you testified that as far as your knowledge of the matter went, that the revision of Mr. Cole's con-

(Testimony of L. B. Mayer.)

tract in the late summer or early fall of 1947 was a revision which you approved because it was made in order to conform to what you understood had been an oral promise made to Mr. Cole? [214]

* * * *

A. Yes, sir.

The Court: All right.

The Witness: A promise was made and I made them keep their promise.

Q. (By Mr. Walker): Now, as I understand it, that was the time that you acknowledged that it was your opinion that Mr. Cole had done good work as a writer? A. Yes, sir.

Q. Referring now to the meeting at the Waldorf-Astoria Hotel in the fall of 1947, which took place on the 25th and 26th of November, if I am correctly informed, I understood you to say that you made some statement at that meeting, I understood you to say that there was a proposal presented. Did that proposal take form in the statement of policy, a statement of policy that was printed in the paper?

A. Printed in the newspapers?

Q. Yes, sir. A. Yes, sir.

Q. At the meeting at which the statement of policy was approved, did you join in the approval of that statement?

A. I can't recall as to what—I don't think I was asked to tell what I thought. I made statements as to my position on the whole matter that was under discussion, but——

(Testimony of L. B. Mayer.)

Mr. Walker: Well——

The Court: Just a minute. Let him finish. Go ahead. [215]

The Witness: But eventually Mr. Johnston and the lawyers, headed by James Byrnes (Jimmie Byrnes), they made up their——

Q. (By Mr. Walker): I understand so and it was presented at a meeting at which you were present, is that correct? A. Yes, sir.

Q. And were you asked your opinion, yourself—— A. Yes, sir.

Q. ——with regard to it? A. Yes, sir.

Q. And did you do so? A. Yes, sir.

Q. And was your expression one of approval or disapproval of the policy?

Mr. Katz: Just a moment. Even though it is so late, it seems to me that that is likely to be objectionable.

* * * *

Q. (By Mr. Walker): Mr. Mayer, were the people present asked to signify their approval of this statement of policy, either by standing or by voting "Yes" or in any other manner?

A. As near as I can recall it, there were all kinds of [216] expressions, all kinds of legal opinions, and the whole thing seemed to center on something has to be done, or the public won't accept us doing nothing, and that Communists shouldn't be hired, and then the question of what is to be done with the men who are in contempt of Congress, on all of which we finally agreed that

(Testimony of L. B. Mayer.)

the only thing to do is to do that and give them a chance to show they were not in contempt and if they are not in contempt, we would take them back and if they were, we would leave them out, and everybody agreed finally that that is the only thing that can be done.

Q. And were you one of the people that so agreed? A. Yes, sir.

Mr. Katz: Just a minute. I move to strike that answer as not responsive.

The Court: No, no. I think it is all responsive except the last statement. He asked whether a method was adopted to express one's attitude toward the matter, and Mr. Mayer has told us so and the answer is responsive except the last paragraph.

The last statement that that was all that could be done will be stricken out, but the rest of it gives merely a narrative in substance of what took place.

Q. In other words, you were telling us what took place after this policy was suggested?

A. Yes, sir. [217]

The Court: All right, go ahead.

Q. (By Mr. Walker): Now, will you tell us to what extent you can as to what was said, that you recall, during the course of that meeting?

* * * *

The Witness: There was a question, they brought up some of our law, some California law that you couldn't ask about politics. Then Mr.

(Testimony of L. B. Mayer.)

Byrnes showed the opposition, I recall that, that that did not apply to Communism, just things of that nature, and they just kept sweeping aside everything and finally all the lawyers had a meeting headed by Byrnes and associates and then they come to the conclusion of where we had this right to do this where they were in contempt and that we had a right not to keep a Communist that we knew was a Communist, and so forth, and they argued. All of those who were for it, of course, stood pat, and those who had some hesitancy about pursuing some policies, they had figured out, eventually they faded out, and the lawyers got up this statement [219] of policy and that was the conclusion of it.

The Court: Including yourself.

A. Yes, sir, after two days of wrangling. I learned a lot of law there.

The Court: You'd better forget it. A little learning is dangerous, I think, especially as to law.

The Witness: That is right.

The Court: That is right. All right, go ahead now.

Q. (By Mr. Walker): Prior to the time. Mr. Mayer, that you joined in as you have indicated the adoption of this statement of policy which was formed at the meeting at the Waldorf-Astoria in October—in November of 1947, what had been your observation of public opinion with reference to the hearings in Washington and particularly that portion of the hearings in which the questions

(Testimony of L. B. Mayer.)

were asked by the Committee and not answered by certain of the parties, including Mr. Cole?

Mr. Katz: We object to that question upon the ground that no proper foundation has been laid. It is incompetent and immaterial.

The Court: I don't think it is proper examination as to the matter before the court at the present time. You have asked Mr. Mayer to testify very fully as to the industry's reaction. Now you are asking him to qualify as a public opinion expert. [220]

Mr. Walker: No, not at all. I am asking him to state his own observation and the question was definitely limited.

The Court: As to public opinion, as expressed.

Mr. Walker: I am asking him to state his own observation.

The Court: I will sustain the objection at the present time. I think the examination of this witness at the present time should be limited to his reaction and to those near him, and he has told us of this problem involved. The question now asks for a broader scope which at the present time is not material. If it becomes material later on, you may recall Mr. Mayer and ask him the question, and after you have qualified him as an expert in assaying public opinion, which he is not qualified yet in this record to do. He is qualified as an executive and successful business man in a particular industry and as being aware of certain things and as being in authority in the particular

(Testimony of L. B. Mayer.)

company, and full latitude has been allowed to inquire into those matters, but I do not think at the present time we should go into that, into another field.

Mr. Walker: I don't think that I have proven that he is a successful business man.

The Court: I think he will admit it.

Mr. Walker: But I am willing to stipulate it.

The Court: I think he will admit it. In fact, in his [221] own statement to counsel, he admitted that a man shouldn't be ashamed to admit of his success. It is not a question of conceit or anything else. It is just accepted as a fact. [222]

* * * *

Thursday, December 9, 1948, 10:00 A.M.

(Jury present.)

Q. Mr. Mayer, you referred yesterday in connection with your recounting of the meeting at the Waldorf-Astoria, on November 24 and 25, 1947, to legal advice that was given at that time and at that meeting by Mr. Byrnes. Was the Mr. Byrnes to whom you referred Mr. Byrnes who was formerly a Justice of the United States Supreme Court and Secretary of State? A. Yes, sir.

Mr. Katz: Just a moment. We object to that upon the ground that it is immaterial. Counsel made a big point yesterday about the motive not being important.

The Court: To identify the attorney is not im-

(Testimony of L. B. Mayer.)

proper. We all know it is the Mr. Byrnes who occupied other positions. [230]

Mr. Katz: I think none of us is naive enough to assume that is the only reason for the question.

The Court: I will tell the jury that the eminence of counsel does not necessarily guarantee the correctness or soundness of their opinions, and the only reason it is brought in is to show that lawyers were present and they acted under opinions of the lawyers. But, ultimately, we have to decide whether there was a breach of contract, and we have to proceed according to the evidence to be received and the instructions on the law the Judge of this court will give you. Counsel may have been wrong or may have been right. The opinion of Mr. Byrnes was introduced merely to show there was discussion and that certain attorneys advised a certain course of conduct, and that is all. If that were binding on both sides, there wouldn't be this lawsuit.

Mr. Katz: I don't think the witness has answered the question.

A. Yes, sir.

The Court: Proceed. [231]

* * * *

Q. (By Mr. Walker): Mr. Mayer, after the hearing in Washington in October of 1947, you did return to California, did you not?

A. Yes, sir.

Q. And in the latter part of October or the early part of November, is that correct?

(Testimony of L. B. Mayer.)

A. I don't know the dates. Don't hold me to dates. Hold me by incidents.

Q. I will tell you that the hearings in Washington ended on October 27th.

A. I left promptly.

Q. You left Washington? A. Yes, sir.

Q. Or, pardon me, I mean October 30th. You left Washington promptly?

A. Right after I testified. [233]

Q. And did you come immediately back to California or did you go to New York and then come to California?

A. I think I went to New York first and then came home.

Q. In any event, it was a short time after the end of the hearings?

A. Not the end of the hearings; the end of my testimony.

Q. Do you know whether or not Mr. Cole was on the train on which you returned to California?

A. Oh, yes; from Chicago here.

Q. And did you have a conversation with Mr. Cole on the train? A. Yes, sir.

Q. Was that a conversation or meeting which was solicited by you or one which was sought by Mr. Cole?

A. I can't recall. He came in to see me in my drawing room.

Q. Will you relate the conversation which transpired, as nearly as you can recall it, between Mr. Cole and yourself at that time?

(Testimony of L. B. Mayer.)

A. We talked about the hearing and I said it is very unfortunate; that I thought he acted very unwisely and had bad advice, because, if he belongs to the Communist Party, the FBI no doubt has got a record of it, and it was no crime, as I saw it, to belong to the Communist Party at the present [234] time, and he should have answered. Well, he thought some personal rights were involved. And I said, "You could have told the chairman that 'I am advised you have no right to ask me these questions but I can't afford not to answer them. No; I am not a Communist' or 'I am a Communist or belong to the Communist Party but I never heard anything subversive or any violence or I would have walked out on them, which ever the case may be, and then you are clear. You wouldn't have any problem on your hands.'" "Well," he said, "I had to stick with the gang. They agreed to do it that way and I had to be with them." I said, "It was unfortunate," or words to that effect. I can't recall exactly but the essence was what I told you.

Q. Was anything said in that discussion of any effort that was to be made or should be made to overcome the effect of the testimony which he had given, any effort by Mr. Cole?

A. I don't recall anything.

Q. Was anything said in that discussion as to any difficulties created in connection with Mr. Cole's relationship to the studio, and his work there, by reason of his conduct at the hearing?

A. If I remember right, I told him I thought

(Testimony of L. B. Mayer.)

he had a great opportunity if this thing hadn't sprung up, but I didn't know what this would do, where it would take us. I think that brought his answer that he had to stick with [235] the crowd or the other fellows and couldn't break away from them.

Q. You did testify at the hearing in Washington, did you not? A. Yes, sir.

Q. The hearing of the Un-American Activity Committee? A. Yes, sir.

Q. In its investigation of infiltration of Communism in the motion picture industry?

A. Yes, sir.

Q. I will state to you that the record, and I think counsel will not take exception to this, shows that your testimony was given on October 20th, 1947, before the committee, and I should like to read at this time, your Honor, certain of the testimony given by Mr. Mayer at that hearing. I am reading from a report of the hearing regarding the Communist infiltration in the motion picture industry, before the Committee on Un-American Activities, House of Representatives, Eightieth Congress, First Session, as printed by the United States Government Printing Office. And counsel on both sides have agreed that this is a correct reproduction of the testimony that was given at that hearing. I refer to page 70 of the publication which I identified, and the portion of

(Testimony of L. B. Mayer.)

Mr. Mayer's statement which was read at the hearing. [236]

"During my 25 years in the motion picture industry, I have always sought to maintain the screen as a force for public good. The motion picture industry employs many thousands of people, as is the case with the newspaper, radio, publishing and theatre business. We cannot be responsible for the political views of each individual employee. It is, however, our complete responsibility to determine what appears on the motion picture screen. It is my earnest hope that this committee will perform a public service by recommending to the Congress legislation establishing a national policy regulating employment of Communists in private industry. It is my belief they should be denied the sanctuary of the freedom they want to destroy."

I am reading from page 72, of Mr. Mayer's testimony as reported, the following:

"Are there any Communists, to your knowledge, in Metro-Goldwyn-Mayer?"

"Mr. Mayer: They have mentioned two or three writers to me several times. There is no proof about it except they marked them as Communists. And, when I look at the pictures they have written for us, I can't find once where they have written something like that. Whether they think they can't [237] get away with it in our place or what, I can't tell you. But there are the pictures and they will speak for themselves. I have as much

(Testimony of L. B. Mayer.)

contempt for them, as much as anybody living in this world.

“Mr. Smith: Who are these people they have named?

“Mr. Mayer: Trumbo and Lester Cole, they said. I think there was one other fellow, a third one.” [238]

Mr. Walker: “Mr. Smith: Is that Dalton Trumbo you are speaking of?

“Mr. Mayer: Yes.

“Mr. Smith: And his position, please?

“Mr. Mayer: He is a writer.

“Mr. Smith: And Lester Cole?

“Mr. Mayer: A writer.”

I am reading now from page 74:

“Mr. Smith: I understood you to say it is impossible for them to get material into the pictures because you have a number of readers and other individuals that are always checking on them; that you, yourself, recently observed some material that might have been, although under the circumstances surrounding the writer it obviously was not.

“What I would like to determine from you is what do you think will happen in a period of 5, 6, or 7 years if these individuals keep on infiltrating, one, two, three, and four, and so on? At that time maybe we won't have individuals that can keep this information out of your pictures.

“Mr. Mayer: I am just hopeful, like I told you in California, Mr. Smith, that perhaps out of this hearing will come a recommendation to the Con-

(Testimony of L. B. Mayer.)

gress for legislation on which there can be no question and they will give us a policy as to how to handle American citizens who do not deserve to be American citizens, and if they are Communists how to get them out [239] of our place.”

Reading from page 79:

“Mr. Wood:” —

Q. (By Mr. Walker): Mr. Mayer, Mr. Wood was a member of the committee, is that correct?

A. Yes, sir.

Mr. Walker: “Mr. Wood: Now I will ask you again, Mr. Mayer, if at the time you took into your employment the men that you have named here who you say have now been designated as men who had attained communistic beliefs you knew that those men believed in and subscribed to a doctrine that you have thus announced, in the excerpts which I read to you, would you keep them in your employment?” [240]

* * * *

Mr. Walker: Now, reading from page 79 from the document that has been identified:

“Mr. Wood: You were quoted in this same article in the New York newspaper as having said that:”

Then follows the quote:

“Soviet Russia must be recognized for and plainly called exactly what it is in terms of international relationship—a powerful nation that challenges and discredits our liberty and that seeks to

(Testimony of L. B. Mayer.)

spread its influence to dominate the lives of men and women in smaller nations.

“Is that a correct quotation of the sentiments that you expressed at that time?

Mr. Mayer: Yes, sir.” [253]

“Mr. Wood: Now I will ask you again, Mr. Mayer, if at the time you took into your employment the men that you have named here who you say have now been designated as men who had attained Communistic beliefs, if you knew that those men believed in and subscribed to a doctrine that you have thus announced, in the excerpts which I read to you, would you keep them in your employment?

“Mr. Mayer: No, sir. I could prove it then, if they challenged me.”

Mr. Walker: It will be stipulated, will it not, counsel, that Mr. Cole did not testify until October 30, 1947?

Mr. Katz: That is right.

Mr. Walker: And that this testimony was given by Mr. Mayer on October 20th?

Mr. Katz: So stipulated.

Q. (By Mr. Walker): Mr. Mayer, in your examination by Mr. Margolis yesterday, you were asked this question and you gave the answer which I shall read: “Let me ask you this. Isn’t it a fact that at the time you left for New York, your attitude was that which you previously had, that, if anything was to be done about this subject, Congress should pass a law; that you weren’t going

(Testimony of L. B. Mayer.)

to be the one who was going to judge men and that you were not afraid of Communists; that nothing was getting into your pictures which was Communistic; and that attitude you still had at the time you left for New York, [254] isn't that so?

"A. Yes, sir."

You recall that testimony, do you?

A. Yes, sir. [255]

* * * *

Q. (By Mr. Walker): I will ask you to state to the court and the jury what you meant by your statement that you were not going to be the one who was going to judge men.

A. As to whether they were Communists or not.

Q. You were not going to be the one to determine the question as to whether they were Communists, is that correct?

A. That is right, sir.

Q. Directing your attention to the fact you made this statement, which I have just read to you, as being a statement of the opinion that you held when you took the train for New York to attend the meetings at the Waldorf on November 24 and 25—calling your attention to the fact that you approved the statement of policy that was framed and published as a result of the meeting at the Waldorf, I am going to ask you to explain to the court and to the jury why it was that, holding the opinion which you have stated you held when you left for New York, you approved, as you

(Testimony of L. B. Mayer.)

said you did, the statement of policy adopted at the Waldorf meeting.

Mr. Katz: Just a second. We object to that question upon the ground it is leading and suggestive, calls for a conclusion of this witness. The statements that Mr. Mayer [256] made are clear. The problem of their effect is one for the jury. It is not the kind of a statement that is vague or ambiguous and it doesn't seem to me that is the subject matter——

The Court: It is a very leading question which calls not for the reasons for his actions but the motivation for his conduct. His conduct ought to speak for what he did and we have gone fully into the conduct. The rest is a matter of argument. I think it is an argumentative question. He is not on cross-examination. Of course, I realize the usual turn these questions take when a witness is put on as an adverse witness. That is why I always ask counsel if they want to go on with the examination or put him on later on, when we can draw the distinction between direct examination and cross-examination. I will sustain the objection to the particular question.

Mr. Walker: I have no further questions at the present time. [257]

* * * *

Recross-Examination

Q. (By Mr. Margolis): Mr. Mayer, you have just heard your counsel read from some of your tes-

(Testimony of L. B. Mayer.)

timony given before the House Committee on Un-American Activities, on October 20, 1947.

A. Yes, sir.

Q. And, of course, he correctly read the transcript at the time. Those are the hearings which you and Mr. Mannix considered very unfair hearings, isn't that so?

A. I never said anything like that.

Q. That is what Mr. Mannix said, is it? Isn't it a fact that Mr. McNutt, another one of the counsel for the Motion Picture Producers, said that this was a very unfair hearing?

A. I didn't hear it. I think he did.

Q. Isn't it a fact that Mr. Johnston, the president of both the Eastern and the Western Associations, said that this was a very unfair hearing?

A. If I am not mistaken, he said it both ways, that, once, it was and, once, it wasn't. [259]

Q. Yes. I agree Mr. Johnston says that about everything.

Mr. Walker: I move that be stricken from the record.

The Court: That may be stricken. Mr. Johnston's conduct is not before the court. [260]

* * * *

Q. (By Mr. Margolis): Let me ask you this. You, as a representative of Loew's, had participated in the hiring of certain counsel or attorneys?

A. I had nothing to do with it.

Q. Well, Loew's did have something to do with it?

A. I imagine so. [262]

* * * *

(Testimony of L. B. Mayer.)

Q. (By Mr. Margolis): Your counsel read a portion of the transcript appearing at page 72, and I would like to go on from the point where he left off. He read the portion in which you referred to the fact that Dalton Trumbo and Lester Cole had sometimes been called Communists or had been alleged to be Communists. And then the script goes on as follows:

“Mr. Smith: —”

He was the gentleman who was questioning you, is that right; A. Yes, sir.

Q. “Mr. Smith: Have you observed any efforts on their part to get Communist propaganda into their pictures?”

And by “on their part” he was referring to Dalton Trumbo and Lester Cole.

“Mr. Smith: Have you observed any efforts on their part to get Communist propaganda into their pictures?”

“Mr. Mayer: I have never heard of any.

“Mr. Smith: Do you personally read the scripts?”

“Mr. Mayer: Some of them; a great many.

“Mr. Smith: Do you personally know if any efforts were made to get Communist propaganda into the pictures?”

“Mr. Mayer: I caught something in a script recently that was anything but Communist connected. They are just as violent against them as I or you and yet there were two scenes and they couldn’t believe I was right and I had to read it to them. They were not Communists who wrote it, but they set the scenes

(Testimony of L. B. Mayer.)

perfectly and we changed it and took it out. We found some other medium to correct the situation.”

You remember that testimony, don't you?

A. Yes, sir.

Q. Later on in your testimony, and I am doing this, if your Honor please, in order to try to short-cut this—if necessary, I will read the testimony itself. However, I think I will correctly summarize it. Later on in your testimony, you referred to the fact that this Communistic propaganda which you found put into a screen play by people who were anti-Communists was showing collective farms in the Soviet Union, isn't that correct?

A. No, sir.

Q. What was it? [264]

Mr. Walker: I think you had better read the testimony to Mr. Mayer and then we will know what he said.

The Court: All right.

Q. (By Mr. Margolis): You did refer, however, there to the picture *Song of Russia*, isn't that right?

A. That was different.

Q. Later on, you referred to the picture *Song of Russia*?

A. Yes, sir.

Q. And, when you referred to the picture *Song of Russia*, you said that originally some Communist propaganda had gotten into it?

A. Yes, sir; that is right.

Q. And that was showing collective farms in the Soviet Union?

A. Yes, sir.

Q. And isn't it a fact that later on the committee on Un-American Activities put on their own expert,

(Testimony of L. B. Mayer.)

Miss Ayn Rand, who testified that, because you did show collective farms in the Soviet Union, you were putting Communistic propaganda into the picture?

Mr. Selvin: We object to that——

The Court: Yes.

Mr. Margolis: I am prepared to read it from the record.

The Court: The point is it is not material. It is [265] improper to compare testimony. In the second place, it is immaterial what the Committee did afterwords and what other witnesses claimed before that Committee, so far as this case is concerned. I happen to have been the next pages and seen the name of some woman named Ayn Rand, some kind of a writer, but we are not interested in what was said. The Congress which authorized it has expired, or not expired, but we are not interested in what the Committee does in the future or what was done in the past, so far as this lawsuit is concerned.

Mr. Margolis: I think I can state it without saying what her opinion was.

The Court: If you do, I will correct you and instruct the jury what is proper and what is not.

Mr. Margolis: Why I think this is proper is here there are references to a hearing in which the word "Communism" is used again and again and used as a general phrase. I think that, in order to understand the context in which those questions were asked, it is necessary to show how this word "Communism" was used and what was meant by the Committee when it

(Testimony of L. B. Mayer.)

was used, so that the questions and the answers begin to have some meaning.

The Court: Oh, no. Furthermore, if it becomes necessary to define Communism, I will define it for the jury in the form of instructions as laid down by the Supreme Court of [266] the United States and other courts which have had occasion to deal with Communism. The manner in which the word "Communist" was used by the Un-American Activities Committee is of no concern of ours in this lawsuit.

Mr. Margolis: Very well.

Q. Going to the meeting in New York on November 25, 1947, isn't it a fact that there were other representatives of the studios from Los Angeles who took substantially the same position as you did at that meeting, that is, the position that nothing should be done about it by this group but that, if anything was to be done, Congress ought to pass a law.

Mr. Selvin: We object to that upon the ground—

The Court: No. I was going to say the objection is sustained. It is recross-examination and can only relate to new matters brought out on their examination. And what took place in that Committee was gone into fully, with all rights of cross-examination, yesterday and you cannot at the present time, unless I authorize you and I will not, go into that, unless you show me a reason why you didn't go into this yesterday, go over the proposition again. The entire meeting was gone into before, who was there and what was said, and Mr. Mayer finally threw up his hands and said that it was impossible to summarize, other than

(Testimony of L. B. Mayer.)

generally, what had been taking place in two days of wrangling. Is [267] that correct?

A. That is right.

The Court: The witness agrees with my summarization.

Mr. Margolis: May I state what the record shows?

The Court: Yes.

Mr. Margolis: The record will show that on our cross-examination we limited ourselves to what Mr. Mayer said and did at the hearing. It was for the first time, when counsel asked as to what others did aside from the resolution and the action that was taken—we did not ask what other statements were made. It was opened up and, therefore, we want to go into it at this time to complete the picture.

The Court: You opened it up and I close it shut by saying the discussions cannot be gone into now. I would not allow them to be gone into yesterday because the only statements that are material are the statements which Mr. Mayer made and the only action that is material is the total or final action of the group, and that has been gone into very fully. The objection will be sustained. Ask your next question, if any. [268]

Q. (By Mr. Margolis): Mr. Mayer, isn't it a fact that, when you finally agreed to the action which was proposed at the November 25th meeting in New York City, at the Waldorf Astoria, you did so because you believed that the industry would have to do something or the House Committee on Un-American Activities would keep on hitting the industry, is that right?

(Testimony of L. B. Mayer.)

A. Not only that but the question of federal censorship. At that meeting, the press was threatening they were going to advocate it if we didn't clean house and that something had to be done; that the industry belonged to the people, like baseball, and that they will not take that quietly.

* * * *

Q. On your counsel's examination, you were asked why you approved the adjustment for Lester Cole, the adjustment in [269] the contract?

A. Yes, sir.

Q. Isn't it a fact that you approved that adjustment because Lester Cole was a hard worker and because you liked him personally?

A. He was a hard worker but they showed me they had made a promise to him at the time they made the contract that, if he did do certain good work, they would adjust something, and I said for them to stick to that promise if he did it, this work in accordance with that proposition. [270]

* * * *

Mr. Selvin: We will stipulate he so testified at that time.

The Court: All right. Read it to the jury. Counsel has stipulated to it.

Q. (By Mr. Margolis): At that time you testified, Mr. Mayer—or the question was, "I see. Do you recall what the basis was for the discussion that Mr. Cole's contract be readjusted?"

"A. No. Just let me think a second.

"Q. All right.

(Testimony of L. B. Mayer.)

“A. There was some claim that we had not been right with him in interpreting or counting or estimating or something that he would have gotten more money, whatever that is hadn’t happened, and I was sympathetic on giving Lester the difference because he was a hard worker, and I liked Lester personally. That is all there was to that.” [272]

Do you recall that testimony? Is that correct?

A. As far as it went; yes.

The Court: You may explain what you mean by that.

A. I remember in reviewing it that there was a promise made to Mr. Cole at the time the contract was made by Mr. Katz, and I said, “Not only is he a hard worker and I like him personally but this promise was made.” And it was so I couldn’t be criticized later because there was no legal ground on which to do it but that it was done verbally. It was so we would stick to our promise.

The Court: All of these reasons were in your mind? A. Yes, sir.

The Court: That you had made an oral promise and he was a hard worker and so forth?

A. Yes, sir. [273]

* * * *

Q. (By Mr. Margolis): You testified here on cross-examination, at considerable length, concerning a conversation which you had with Mr. Cole on the train returning from the East to Los Angeles, following the conclusion of the hearings in Washington? A. Yes, sir. [274]

(Testimony of L. B. Mayer.)

Q. After you testified at the hearings in Washington?
A. Yes, sir.

Q. Has your memory been refreshed on that conversation in the same way that your memory was refreshed with respect to other conversations?

A. I don't know what you mean by that.

Q. Do you remember testifying, upon the taking of your deposition on March 10, 1947, that you couldn't recall what was said in that conversation?

A. Oh, much has been refreshed of my memory in the whole matter, as we went over it and reviewed it.

Q. And the fact is that, on March 10, 1947, you couldn't recall a single thing about that conversation, could you?

Mr. Selvin: To what portion are you referring?

The Court: The conversation on the train.

Mr. Selvin: I would like to have the page and line if he is referring to some specific portion of the deposition. [275]

Mr. Margolis: I refer to page 52. It starts up at line 3 and runs down through that page.

The Court: All right. Especially I presume you refer to the particular question on line 10, page 52.

Mr. Margolis: That is right, and then——

The Court: All right. Well, he has answered the question.

Q. You said at the time of the deposition you did not recall the conversation, is that correct?

A. Yes.

Q. And you say now, since you have been thinking

(Testimony of L. B. Mayer.)

about the matter, you have remembered the conversation, is that correct? A. Yes.

The Court: All right.

Q. (By Mr. Margolis): And at that time you couldn't recall any part of the conversation

The Court: All right, he has answered that three times.

The Witness: That is what I said.

The Court: He has answered that three times.

Mr. Margolis: I think I have no further questions.

The Court: All right. Have you any further questions, gentlemen? Have you any further questions?

* * * *

[276]

The Court: All right.

Mr. Selvin: And Mr. Walker is impersonating Mr. Mannix.

The Court: All right.

(The following questions were read by Mr. Selvin and the following answers were read by Mr. Walker, from the deposition of E. J. Mannix, which was taken March 31, 1948, before Sylvia Prager, a Notary Public, at Los Angeles, California:)

“Q. Are you familiar with the letter of suspension? A. Yes.

“Q. Are you familiar with the reasons for which the company suspended Mr. Trumbo?”

Mr. Margolis: I object to that as incompetent, irrelevant and immaterial and not connected with any issue in this case.

(Deposition of E. J. Mannix.)

Mr. Selvin: It is connected up in the succeeding answer, your Honor. It is connected up with Mr. Cole in the succeeding answer.

The Court: Objection overruled.

“A. You have the letter? I will read it.

“Q. Well, aside from what you said in the letter, I would like to know what those reasons are?

“A. I think that the letter is evidence in itself.

“Q. Have you any objection if I elaborate on the letter?”

Mr. Selvin: That was a query addressed to me and I answered [279] it. Do you want to delete that?

Mr. Katz: I don't think it is necessary.

Mr. Selvin: And then the witness went on. [279a]

“A. I will take you back prior to the writing of the letter. I was in New York at a meeting. The real motive for dismissing or suspension of Mr. Trumbo was that the action of Trumbo before the Congressional Investigating Committee in being cited for contempt, at that time when the country was pretty well alarmed over Communism, that in his action in refusing to answer the question, it seemed to set a snowball rolling that the boys were Communists.

“That, and the fact that they had taken the stand and in the general opinion of the people I came in contact with and spoke about, they had become of a great disservice to the industry, not on account of whether they were a Communist or not—I don't think that made a bit of difference, but I believe that the people of America had a hysteria. The conversa-

(Deposition of E. J. Mannix.)

tions were hot and heated all over on what should and should not be done.

“After listening to the number of comments, both the radio, press and individuals, the conclusion in the opinion of the presidents of the companies were that this disservice which was caused by their action before this Committee in being cited for contempt, was something that had to be dealt with in the manner in which they decided in New York.

“I concurred with the final conclusions of the presidents.

“Q. This will apply also to Lester Cole, will it not? [280] A. Yes.

“Q. With respect to either Mr. Trumbo or Mr. Cole, were there any other reasons other than those which you have stated for their suspension?

“A. I think the only reason was the fact their action and attitude before the Congressional Committee.”

Now turning to page 40, line 9.

“Q. As of the time of the giving of this notice which is December 2, 1947, isn't that right, to both Mr. Trumbo and Mr. Cole?

“A. I believe that is the correct date.

“Q. As of that time, what facts if any, did you have upon the basis of which the conclusion was reached that either or both Mr. Trumbo and Mr. Dalton had shocked and offended the community and brought themselves into public scorn and contempt?

“A. The situation following the hearing in Washington in my mind had created a very bad public re-

(Deposition of E. J. Mannix.)

lations between the industry and the American people due to the action of the group who were appearing before the Congressional Investigating Committee.

“I feel and felt at the time that a great disservice was rendered by these men to their employers when they acted the way they did, and were cited for contempt. A great majority or I would say a part of the press of America and [281] a part of the radio and parts of editorials were condemning their action.

“A business that is dealing in public favor cannot have a small percentage of the press nor the radio out against them. Whether 50 per cent of the press was for them and 50 per cent was against them, we suffered. We have always felt that criticism against our industry hurts us where praise does not help us to the same degree.

“At about this time we had a typical example of what organizations when they organized, can do against the motion pictures for a man who is not called before the Congressional Committee, in the investigation, was Mr. Chaplin. He had a picture playing at the time. In Jersey City, the groups in the town took it upon themselves and picketed the theatre claiming Chaplin was a Communist.

“Whether he is a Communist or not, I don't know. I don't care, but the people who we cater to in the picture business showed in that particular case a firm reaction against people who were Communists.

“Dalton and Lester, whether they are or are not Communists, I am not judging and don't care

(Deposition of E. J. Mannix.)

whether they are or are not Communists. He did something that met with disfavor with the American people. As I say, whether 50 per cent—I am not claiming all the press or all the radio because I didn't read all the press or I didn't hear the radio, but I heard considerable opposition to their [282] stand. I read considerable against them in the newspapers. I read some favorable papers.

“In the situation in Jersey City which I think the records can be produced—and I don't want you to hold me to it dollar and cents, but a theatre that was doing an average weekly business of \$20,000 was picketed and the business fell to \$10,000.

“At the time that we served this notice, we had information whether true or untrue, that organizations in America were about to put on a campaign against the picture business, particularly against the members who had defied Congress, and if that organized campaign would have taken place, I can assure you that it would have been a very sorry day for our picture business. If the situation, for example, in Jersey City were reflected throughout the United States of America, they would all have been in the red. There is no question as to that.

“We were in that business to protect ourselves, to keep ourselves in business. I am not the hysterical type. I was convinced that if the American Legion, if the Catholic Church which played a part in the Jersey City situation—I am not sure they did, if other organizations in America would have concentrated on these men and concentrated on the picture

(Deposition of E. J. Mannix.)

business for not paying heed when at that particular time whether true or not true, the American people felt that a Communist was an enemy to our country.

“That was exaggerated by what you are as familiar with, by—Russia was mentioned. There was a cold war going on, and that, by no one set of newspapers. That was by a great number of papers in America, that a cold war existed between statements made by our State Department to that.

“Now, the fact that they took action, gave the American people confidence that the American motion picture business was American and stood for American ideals. It is a simple process for someone to be condemned. I know that, but if they would have gone out—when I say they, if these organizations would have gone and carried on which we were advised they were going to do, it would have been a serious thing.

“Today, the picture business suffered to a degree over this. To what degree, I don't know. All I know is adverse criticism about the business hurts it. I don't care what it is about. I don't care whether it is some star in Hollywood who does something, it affects the general industry when it happens.

“Here was a group of men that went down to Washington, and I don't want to quote their testimony or what they said. All I know is I can remember who said it, but they likened our Congress to Himmler, to Hitler, and to a few more of the Nazis which I think was a disgrace to do regardless of their

(Deposition of E. J. Mannix.)

feelings at the time, but they did it, and that aroused indignation in the American people. [284]

“I have been around, talked to people. I have met some that said that we were wrong, but I meant the majority who talked to me, that our action was right. All I can say that whether I was right or wrong in what I did, I did it with the best of intentions for the industry. The record of the Chaplin thing is indicative of what would happen in this business, and I don’t think you can close your eyes to it, and we couldn’t close our eyes to it.

“Sure, there were hazards and dangers to what we may do. There were dangers both ways, and there is no question in my mind—there is a question I suppose in your mind, but in my mind there is no question that the industry did the right thing at the time.”

Mr. Katz: Now, just a moment. I will not attempt to segregate, Judge Yankwich, the conclusions and the matters which are clearly not responsive, but it seems to me, with an answer like that, I would ask for an admonitory instruction of the court that remarks such as “Now, the fact that they took action, gave the American people confidence that the American motion picture business was American and stood for American ideals”; is just the sheerest kind of a conclusion; his reference to the fact that they likened our Congress to Himmler hasn’t the slightest relationship to Mr. Cole and, while I don’t want to unduly prolong the session—your Honor may chuckle at that, but I really don’t—I do think that we are entitled to an admonitory instruction or admonition to

(Deposition of E. J. Mannix.)

the [285] jury that these are not true facts; these are merely statements of the opinion of Mr. Mannix which are really not responsive to the question asked. I leave the express language to the court.

The Court: Well, I merely say, ladies and gentlemen of the jury, the only reason that this explanation is brought in is because it bears upon the reasons for the action.

Now when Mr. Mannix states his reasons, you are not to assume that the facts which he states and which are not within his own knowledge are proved or disproved. He merely gives the ground upon which they acted, the belief that a certain action on their part was warranted by the circumstances. But the only facts in his answer which you must take as proved are those facts which he testified of his own knowledge. Is that it?

Mr. Katz: That is substantially it.

The Court: Is that satisfactory to you?

Mr. Selvin: Yes, your Honor.

The Court: Well, all right.

Mr. Katz: It is a satisfactory statement.

The Court: I want to be sure that everything I say is objected to at the proper time. I don't want to be confronted later on by objections that were not made before.

Mr. Selvin: I assure your Honor that when I have any objection to urge, that I will urge it at what I think is the proper time. [286]

“Q. Mr. Mannix, you said a minute ago that there

(Deposition of E. J. Mannix.)

were hazards and dangers both ways. What did you mean by that?

“A. I think it is a hazard any time you cross the street, any time you decide on a policy, any time you decide on anything you are going to do, whether you are going to advertise the picture that way or this way, there is a hazard.

“Q. What hazard were you referring to?

“A. I was referring to the general hazard of making a decision when this was justifiable. Evidently these ten men should be discharged for their contempt before Congress.

“Q. You felt that might also arouse public opinion against you, did you not? A. I did not.

“Q. What hazard were you referring to?

“A. It is just a hazard of doing things. There may be hazards, there may be public relations hazards, anything you do. There is a hazard when you make a move of that kind.

“Q. What I am trying to get at, you said a moment ago there were hazards both ways. I want to find out what hazards you had in mind with respect to the action which you actually took.

“A. I don't know of the hazards of the action we took. I think it was right. [287]

“Q. You think there were no hazards?

“A. No public relations hazards, no hazards as far as we were concerned. There may have been legal hazards in what we have done. It proves that there must have been, because there is a lawsuit on it to-

(Deposition of E. J. Mannix.)

day, so that hazard if I anticipated it, I anticipated correctly.

“Q. You had been advised before you took this action that you would probably be sued?

“A. That is correct. There was the hazard.

“Q. Now, also you have received you say that there was no hazard of public condemnation of what you took, of the steps that you did take. As a matter of fact, there has been considerable public condemnation, has there not of your action in firing these men, suspecting these men?

“A. Mr. Margolis, I thought I covered that in what I said. I think that adverse criticism is what hurts you in the public relations business when you are dealing with the public. A lot of people say that the Buick '38 is a good car. Hundreds have been satisfied but let a few dissatisfied people advertise about it, and it hurts the Buick proposition.

“Q. You didn't understand my question. I said, as a matter of fact, since you have discharged these men, you know, do you not, that there has been considerable public criticism of your action in discharging them? [288]

“A. Now, don't think I am evading the answer. I am not acquainted with what you are talking about to any degree. I have heard it. I haven't read any great criticisms except during the period I told you. There were some editorials that were favorable and some were unfavorable.”

Mr. Selvin: Now, will you turn to page 71, line 20.

Mr. Walker: I have the place.

(Deposition of E. J. Mannix.)

Mr. Selvin: I think first, your Honor, on the context, the statement should be made that the portion immediately preceding which was read by Mr. Margolis yesterday referred to the Waldorf - Astoria meeting and I think ended with the answer to the following question:

“Q. Did he open the meeting? Did Mr. Johnston open the meeting? A. I believe he did.”

And I am picking up at that point.

The Court: All right.

“Q. Did he make any statement as to the purpose for which the meeting was called or by whom it had been called?

“A. I expected to be asked that question, and I have been racking my brain to find out what his opening statement was. I am at a complete loss. I recall that he spoke on a general world condition of the motion picture business. I recall that quite distinctly.

“I don’t recall whether or not — I am sure he did [289] although I couldn’t swear under oath that he did, that he told of the horrible treatment that the industry received under the Thomas Committee, the way his testimony was misinterpreted and all before, and that died away quickly, and we got down to the issue at stake, and the dangers were confronting us throughout the world.

“Q. Before going into that in detail, Mr. Mannix, I wonder if you would give us your best recollection as to the persons present at that meeting?

“A. It almost looks like I am trying to avoid an answer. Now, there was at least 65 to 70 people there.

(Deposition of E. J. Mannix.)

“Q. Give us the names of as many as you can remember.

“A. A lot of people I don't know by name, Justice Byrnes, Eric Johnston. There was an associate counsel of Byrnes. I think his name was Russett, isn't it?

“Mr. Benjamin: Yes.

“The Witness: There was Sam Goldwyn, Donald Nelson, Walter Wanger, Joe Schenck, Nicholas Schenck, Louis Mayer, Dore Schary, Chairman of the Board of Universal, Cowden, Barney Balaban, Henry Ginsberg, a number of attorneys.

“Now, the attorneys from the Coast were Messrs. Silberberg, Mr. Benjamin, Mr. Wright, Herb Freston, Spyros Skouras was there. Otto Cagel, J. Robert Ruben, Ed Cashelman, Earl Hammond. That is a poor memory of 60-odd people who were there. [291]

“Q. Michael C. Mitchell?

“A. Of Twentieth Century.

“Q. Y. Frank Freeman?

“A. That I don't recall. Hank Ginsberg was there.

“Q. How about Harry and Jack Cohn?

“A. Harry was there and Jack was there, both of them.

“Q. Mr. Ben B. Kahane?

“A. Kahane was not there.

“Q. Dore Schary was there?

“A. Dore Schary was there.

“Q. Ned Depinet?

“A. Sure, Ned Depinet was there. If he wasn't at

(Deposition of E. J. Mannix.)

that meeting, he was at the meeting I interrupted before this meeting started of the Association.

“Q. Leon Goldberg.

“A. I don’t remember Leon Goldberg being there.

“Q. Neither of the Warners, Harry or Jack?

“A. I don’t think either Harry or Jack. Herbert Freston was there and the Major and their attorney in New York, Perkins.

“Q. Herbert J. Yates?

“A. He was there. Yates was there.

“Mr. Benjamin: I don’t think so.

“The Witness: Who represented Yates?

“Mr. Benjamin: I am not sure of it. I don’t know that anybody was there from Republic. [291]

“Q. (By Mr. Margolis): Hal Roach? Was he there? A. No, he didn’t come out.

“Q. Donald Nelson?

“A. Donald Nelson was there.

“Q. Do you know whether Mr. Nelson had an attorney with him? A. I couldn’t say.

“Q. Were there any public relations men there?

“A. Not that I know of, not that I know of. Howard Strickland went East with us, but he was not at the meeting. Howard Strickland.

“Q. All right. Now, you started to tell us what happened, and I think you had gotten to the portion of Mr. Johnston’s report in which he talked about world conditions and was then talking about the conditions of the motion picture industry in the United States.

“A. I didn’t get that—that he spoke of world

(Deposition of E. J. Mannix.)

conditions? I told you that was the part of his speech that was clearest in my mind. He told of conditions, the tax of England was on, and told the situation and told the financial condition of England was in, told of the other countries of Europe where our money was being frozen, their money was being taken out, and that went on for a long, long period, all of great depression, and we were depressed, and I don't recall how the meeting got into swing for the subject that was most important to be discussed. [292]

"I can't recall how that started. It may have been a recess and we may have come back after his talk of world conditions. I am not sure. It is unfortunate and I hate to seem stupid in this, but I just can't tell you."

* * * *

[293]

"Q. Just give us your best recollection, Mr. Mannix.

"A. If I had some of the members here, why they would refresh with me things that went on, but this part of it, I knew you were going to ask me this question, and I have been trying to figure it out for a couple of days.

"Q. All right, then you did—whether after a recess or not, you did get into a discussion of the situation resulting from the hearings. Is that right?

"A. That is right.

"Q. Now, did Mr. Johnston first report on that subject?

"A. I am not sure whether it was Johnston or Justice Byrnes who discussed the situation.

(Deposition of E. J. Mannix.)

“Q. Well, it was one of them. Do you recall the substance of what they said? [295]

“A. It is most embarrassing not to, but I can’t recall what the conversation was during this time. I remember—here is the first reflection I get of the meeting. There was a meeting appointed to draw up the resolution that was sent to the press so Mr. Johnston appointed a committee.

“Q. Do you remember who was on that committee?

“A. I remember two people on the committee, Nicholas Schenck and Dore Schary.

“Q. Don’t remember anybody else?

“A. Those are the only two I remember.

“Q. But there were others. You just don’t remember their names?

“A. I think there were six or ten appointed on the committee. I think Barney Balaban was part of the committee. It would have been made up of the New York representatives, I presume.

“Q. Barney Balaban you say you thought?

“A. I thought he was on the committee.

“Q. Harry Cohn? A. Well—

“Q. If you don’t remember, just say so.

“A. I don’t remember?

“Q. Mr. Cowden?

“A. I imagine Cowden was on it.

“Q. Walter Wanger? [296]

“A. Yes, Walter Wanger.

“Q. Mendel Silberberg?

“A. Sam Goldwyn was on it.

“Q. Mendel Silberberg?

(Deposition of E. J. Mannix.)

“A. He wouldn't have been appointed on the committee. He may have been counsel on the committee.

“Q. Donald Nelson? A. I couldn't say.

“Q. Herbert Freston?

“A. I don't think so.

“Q. Was any report made prior to the time that the committee was appointed, or was anything said by the persons present with respect to the impact, public relations-wise of the position taken by the men cited for contempt upon the industry?

“A. There were general statements made which all led everybody present to believe that it was important for the good of the industry that definite action should be taken against the ten men because their disservice to the industry, if action wasn't taken, we would have to have all kinds of legislation against us. They would have public opinion against you and the Federal censorship was discussed.

“The thing that finally came out of it all was the fact that these ten men in their utter disrespect for the congressional committee had done a disservice to this industry, [297] and whether or not they were Communists by refusing to answer Congress, the American people were led to believe at a time and conditions that they were, that men stood on whatever rights, not to answer, they had branded themselves as unfriendly to the situation and unfriendly to the country.

“Now, whether they were right in their conclusions, that seemed to be their conclusions at the meeting, and that was the predominate thought and

(Deposition of E. J. Mannix.)

facts prove that must have been the predominate thought because that was the conclusion of the meeting that these ten men should be discharged or suspended from any further services in the industry until they can purge themselves and free themselves of being proven Communists.

“Now, it all led and the conclusion—that is, because the statement, the question was issued and approved by the presidents of the companies. It was so directed to the companies from the presidents that this action should be taken, so when you ask me of my participation in it, which I went into long detail before, I was given instructions that this was the final decision.”

Mr. Selvin: That is all.

* * * *

[298]

GEORGE WILLNER

a witness for the plaintiff, being first duly sworn, testified as follows:

* * * *

Direct Examination

By Mr. Katz:

Q. Mr. Willner, what is your business or occupation? A. I am a literary agent.

Q. Will you explain to the jury what a literary agent is?

A. Well, we are known as 10 percenters but actually the work we do is to represent writers who write books, stories and so forth, in an effort to sell them to the motion picture studios and producers.

Q. Were you connected with any particular agency in 1945? [300] A. Yes, sir.

(Testimony of George Willner.)

Q. What was the name of that agency?

A. Nat C. Goldstone Agency.

Q. And did the Nat C. Goldstone Agency and you as the individual particularly represent Mr. Lester Cole as one of the clients of your agency?

A. We did.

Q. Calling your attention, Mr. Willner, to the spring of 1947, as agent for Mr. Cole, did you have a conversation with Mr. Edward J. Mannix?

A. Yes, sir; I did.

Q. And where did that conversation take place?

A. In Mr. Mannix' office.

Q. And who else was present besides yourself and Mr. Mannix?

A. Mr. Charles Goldstone was there and several executives of the studio kept coming back and forth into the office. None remained, however.

Q. Will you be good enough to tell us, in substance or effect, what you said to Mr. Mannix at that time and what he said to you?

A. Well, I was there, as Lester Cole's representative, in an effort to try to improve Lester Cole's contract, current at that time, and I spoke to Mr. Mannix about the fact that the contract was now in effect for more than a year and [301] that nothing much was happening, according to the terms of the contract, that was improving Mr. Cole's position. Mr. Cole at the time was writing a screen play called the "High Wall". There was great enthusiasm about it in the studio. And I suggested to Mr. Mannix that Mr. Cole be allowed to direct this picture. The conversation carried along about 10 minutes along the

(Testimony of George Willner.)

lines of the possible direction by Mr. Cole, until we came to the point of Mr. Cole's politics. I said that Mr. Cole had told me that he was very concerned about the fact that possibly the studio was not improving his position at that time because of the fact there were many articles and editorials in the local trade papers, namely, the *Hollywood Reporter*, and that possibly the studio executives were taking that into consideration in not improving Mr. Cole's position. As near as I can recall Mr. Mannix' exact words, they were, "The studio policy and mine in particular is we don't give a damn what people write or say about Mr. Cole's politics. We are concerned primarily with Mr. Cole as a craftsman and what he does for this studio." He also said that Mr. Cole was a most loyal, most conscientious and most dependable craftsman, "and we have only the highest regard for his ability."

Q. Did he refer to him as loyal?

A. Yes; extremely loyal.

Q. Do you remember that specifically? [302]

A. I do.

Q. Have you now told us substantially everything you recall about Mr. Mannix' conversation at that time?

A. Yes. We left with Mr. Mannix saying he would see what could be done.

Q. Did you then carry on negotiations looking to the betterment of Mr. Cole's then existing contract?

A. For some months I did.

Q. And did you see a Mr. Benjamin Thau?

A. I did.

(Testimony of George Willner.)

* * * *

Mr. Selvin: We will stipulate to what Mr. Thau's position is.

* * * *

[303]

Mr. Katz: I will accept Mr. Selvin's statement of Mr. Thau's position. We will accept it in the interests of time.

Mr. Selvin: He was at that time an executive producer and vice-president of the studio.

Q. (By Mr. Katz): What was your conversation with Mr. Thau?

Mr. Walker: You haven't fixed the time.

Q. (By Mr. Katz): That was several months, was it, after, or some time after, the conversation with Mr. Mannix?

A. Yes; it was about a week afterwards. I would say it was in the latter part of April, 1947. I saw Mr. Thau about making specific changes in Mr. Cole's contract on the theory that Mr. Cole in his first assignment, which was "The Romance of Rosy Ridge"—I was also the literary representative for another man who was then hired to do the script. This man's salary was \$2,500 a week. And this man could have had the assignment. As a matter of fact, he was very much wanted.

Mr. Selvin: We object to that—

Q. (By Mr. Katz): What did you say?

A. I said exactly that.

Q. Just confine it, in substance, to what you said to Mr. Thau. [304]

A. I told Mr. Thau this man could have worked on this assignment at \$2,500 a week. This man did

(Testimony of George Willner.)

not want to do the assignment and we were then able to negotiate for Mr. Cole. Mr. Cole's salary was \$1,000 a week. I also reminded Mr. Thau that at the time Mr. Cole signed the permanent contract with the studio he was told by Mr. Sam Katz that, in the event that his work was satisfactory, within a year they would be glad to make an adjustment of this contract. I reminded Mr. Thau that more than a year had passed and no adjustment had been forthcoming. I reviewed Mr. Cole's work at the studio, and Mr. Thau then asked me to send him a letter telling the various things that Mr. Cole had done during the year and what changes Mr. Cole wanted in his contract.

Q. Then did you see Mr. Thau again?

A. I saw him several times after that.

Q. Do you recall the conversation which you had with Mr. Thau immediately prior to the time he sent you to see yet another executive?

A. Yes; it was one afternoon about 5:00 o'clock.

Q. Will you fix the time of the month, if you can?

A. I would say it was the latter part of June, in the month of June, 1947. Mr. Thau said that this wasn't a matter that only he was involved in and suggested that I see a Mr. Vetluggin.

Q. So that the negotiations had been going on from [305] some time in April and up to June in connection with it?

A. Yes.

Q. And I think you said he asked you to see Mr. Vetluggin?

A. That is right. Mr. Vetluggin was head of the scenario at Loew's.

(Testimony of George Willner.)

Q. And where did you see Mr. Vetluggin? [306]

A. I saw him in Mr. Vetluggin's office.

Q. And what was the conversation with Mr. Vetluggin?

A. I told Mr. Vetluggin Mr. Thau had asked me to come down to see him to enlist Mr. Vetluggin's help in convincing the executives that an improvement in his contract was justified. Mr. Vetluggin said there was no doubt in his mind whatsoever that an adjustment of the contract was justified. I asked Mr. Vetluggin if he and the other executives—and I have talked to many executives about the adjustment of his contract—if they all felt that his contract was justified, why the big delay. And I also reminded Mr. Vetluggin or told him at the very same time there was an editorial and stories which were appearing in regard to Mr. Cole being a Communist, if I recall, an editorial by Mr. Billy Wilkerson of the *Hollywood Reporter*, in which Mr. Wilkerson said Lester Cole was a Communist; that he should be driven from the industry or he should be blacklisted. There many such stories and articles which appeared in the *Reporter*. There was one which concerned Mr. Cole and myself greatly, in which I think it was Mr. Thomas made the statement that all of these writers and supposed Reds, including Mr. Cole, would be driven from the industry within 60 days. I asked Mr. Vetluggin pointblank if these articles, these editorials and these rumors, which were current in the studio, were having their effect [307] on the fact that this contract was not being negotiated, and Mr. Vetluggin told me that the studio policy was such

(Testimony of George Willner.)

that they were not concerned with what a writer did as far as politics were concerned. I then suggested to Mr. Vetluggin that, since Mr. Cole was so worried about this, he call Mr. Cole in.

Q. Did Mr. Vetluggin then call Mr. Cole in?

A. Yes; he did. He phoned him in his office and he came down immediately.

Q. Was there then a conversation between Mr. Vetluggin, Mr. Cole and yourself?

A. There was.

Q. And will you tell us what then went on?

A. Mr. Vetluggin said that, in his opinion, one of the reasons the adjustment had not been made on the contract was that our demands for an increase in salary and other conditions were too exorbitant; that in his opinion, no increase in salary had ever been granted at Loew's, since he had been on the lot, which amounted to more than 50 per cent of a person's or employee's current salary. Mr. Cole at that time was making \$1,150 a week, and we had asked for \$2,500 a week, an adjustment to \$2,500 a week, because Mr. Cole was very much in demand at other studios at that particular time. Mr. Vetluggin said, if we modified our demands, there was no doubt about that he could put this [308] negotiation through immediately. We then agreed upon a reduction to \$1,750 a week and Mr. Vetluggin said he would take this up with Mr. Thau and the other executives at the studio, upon which we left.

Q. Did you then see Mr. Thau?

A. Yes; I saw Mr. Thau about a week after that.

Q. And were there some more negotiations?

(Testimony of George Willner.)

A. There were some more negotiations. Mr. Thau said that the fact that the funds for the studio were being frozen in England and that the income from England was stopping made it very difficult for the studio to adjust a contract; that these things had to be taken up directly with the president of the studio, Mr. Nicholas Schenck and, in his opinion, it was better to delay the matter another couple of weeks, when he thought Mr. Schenck was coming to town. I then mentioned the articles to Mr. Thau which were appearing daily in the Hollywood Reporter and editorials by Mr. Wilkerson and suggested, since Mr. Cole was so concerned about it and felt that the studio was probably stalling about his politics, that he call Mr. Cole in and explain the fact that there was no such thing; that they were, first, waiting on the situation to clear up as far as England was concerned and, secondly, waiting for Mr. Schenck to come to Hollywood.

Q. Did you suggest to Mr. Thau that he call Mr. Cole [309] down? A. I did.

Q. Was there then a meeting with Mr. Cole and Mr. Thau?

A. A meeting was arranged for the following morning at 11:00 o'clock.

Q. And did Mr. Thau meet with Mr. Cole and yourself? A. He did.

Q. Just tell us, in substance, what was then said by Mr. Thau, who has been identified as a vice-president of the company, yourself and Mr. Cole?

A. Mr. Thau was very friendly to Mr. Cole when he came in. I will try to remember his exact words.

(Testimony of George Willner.)

He said, "I hear you are worried, Lester." And Lester said, "Yes; I am. These negotiations for my contract have been going on now for three months or more and nothing has happened on it. I would like to know, and I want to put this question to you very bluntly and forthrightly, 'Since I have been accused of being a Communist in the press, in the trade papers and on the lot, and I have heard rumors that Mr. McGuinness and others here are anxious to have me taken off of the lot, I feel that especially now, since I am very much in demand in other studios, if it is the opinion of this studio that they are not going to adjust my contract, I would like to ask the studio to release me from my contract. [310] I think this is only fair and I think you should see this as a fair man.' Mr. Thau's answer was, "No such thing. We do not concern ourselves here with a man's politics. If you will leave this matter entirely to me, I will see that this contract is adjusted and will try to get it done within the next few days." Lester then said, "Will you give us a specific date when we can come back and discuss it again?" And he said. "I can't do that but leave it in my hands and I will see that it is taken care of."

Q. Was there any suggestion made at that time about Mr. Cole talking with Mr. Mayer?

A. Yes. He said he thought it would be a good idea if Mr. Cole had a talk with Mr. Mayer, and that he, Mr. Thau, would arrange for such meeting.

Q. Sometime thereafter did you sit down with Mr. Thau and discuss the terms of the adjustment?

A. Yes. I believe this was about the middle of

(Testimony of George Willner.)

August, in which we discussed the various changes that were to be made and which had already been agreed upon by Mr. Thau and some of the other executives. Do you want me to give the changes we discussed?

Q. Not at this time. We will introduce them. Was it on September 23, 1947, that your office received, executed by Loew's, Incorporated, this instrument which I show you, which counsel stipulates is the amendment to the contract? [311]

A. Yes, sir.

Mr. Katz: We ask that the letter of transmittal, Judge Yankwich, and the amendment attached to it, be marked as our exhibit next in order.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 3 in evidence.

* * * *

[312]

[Plaintiff's Exhibit 3 is the document, a copy of which appears elsewhere herein as Exhibit B attached to the Complaint.]

Cross-Examination

By Mr. Walker:

Q. Mr. Willner, you referred to a paper which I understood you to say was the Hollywood Reporter, as a paper in which certain articles had appeared charging Mr. Cole with being a Communist, is that correct? [315]

A. Yes, sir.

Q. The Hollywood Reporter is what is known as a trade paper, is it not?

A. That is right.

Q. And its circulation is primarily amongst the people here connected in one way or another with

the motion picture industry? A. That is right.

Q. In this locality, that is, in and about Los Angeles? A. Yes, sir.

Q. Its entire circulation would not exceed a few thousand copies at the most, is that correct?

A. I believe that is so.

* * * *

[316]

ROBERT W. KENNY

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert W. Kenny.

Direct Examination

By Mr. Katz:

Q. Mr. Kenny, in the month of October, 1947, were you one of the attorneys for the plaintiff, Lester Cole, in connection with the hearings which took place in Washington, D. C., on October 20th to October 30, 1947? A. I was.

Q. When did that hearing begin, Mr. Kenny?

A. On Monday morning, October 20th.

Q. Of the year 1947? A. Yes.

Q. On the Sunday night before Monday, October 20th, did you meet with Mr. Eric Johnston, Mr. Paul V. McNutt and Mr. Maurice Benjamin in the suite of Mr. Paul McNutt in the Shoreham Hotel in Washington, D. C.? A. Yes.

Q. Would you state for the record who Mr. Johnston is, who Mr. McNutt is and who Mr. Maurice Benjamin is?

(Testimony of Robert W. Kenny.)

A. Well, Mr. Benjamin is here, an associate of Mr. [317] Selvin's.

Q. As one of the attorneys for Loew's, Incorporated?

Mr. Selvin: I will be glad to stipulate with you that he is a member of the firm of Loeb & Loeb who represent Loew's, Incorporated, generally, on the Pacific Coast.

Mr. Katz: Thank you very much.

Mr. Selvin: He is not of record in this particular litigation.

The Witness: And former Governor McNutt was general counsel for the motion picture industry in the hearings that were to take place the following two weeks.

And Eric Johnston is the president of the Motion Picture Producers' Association, is and was at that time.

Q. (By Mr. Katz): And did you have a conference with Mr. Benjamin, Mr. McNutt and Mr. Eric Johnston on the day before the hearing began?

A. Yes, I did.

Q. Did you state to them whether or not you were the attorney for Lester Cole, among others?

A. Well, I stated—the conversation was not solely between myself and those three gentlemen. I was accompanied by the other attorneys for Mr. Cole and other gentlemen, I was accompanied by Mr. Bartley Crum, an attorney of San Francisco and New York, who was one of co-counsel in that matter, yourself, Mr. Margolis, I think Mr. Popper and a Mr. Rosenwein. [318]

(Testimony of Robert W. Kenny.)

We all went to this conference at Governor McNutt's suite.

Q. Do you recall what was said by you and by you and by the persons present in connection with the forthcoming hearing?

A. Yes. I think I opened the discussion saying that we represented employees of the motion picture industry, that they were our clients, that the producers were their clients and that, at that time we wished to show the attorneys and representatives of the producers what legal steps we had taken and intended to take at the hearings to open the following morning.

Q. Did you at that time hand to Mr. Johnston, McNutt and Benjamin copies of a telegram which had been sent to the Committee on Un-American Activities, together with a copy of memorandum of law in support of a motion to quash subpoenas?

A. I did.

Q. I show you these documents and ask you whether these are true and correct copies of the instruments that you handed to Paul McNutt, Eric Johnston and Maurice Benjamin on Sunday evening, October 19th, 1947.

A. They are. [319]

* * * *

Mr. Katz: Would your Honor be good enough to have it marked for identification?

The Court: Oh, yes, we will do that. Mark it for identification.

The Clerk: Plaintiff's Exhibit 4, marked for identification.

* * * *

[321]

(Testimony of Robert W. Kenny.)

Q. (By Mr. Katz): Go on and tell us, Mr. Kenny, please, what you said after you handed to these gentlemen the instrument which has been marked Plaintiff's Exhibit 4, for identification?

A. Well, the gentlemen looked through the instrument. I believe it was Mr. Benjamin who said that the points there were very interesting and some of them would probably have to be—that he didn't know what the answers were, that probably the Supreme Court some day would have to give the answers to some of the questions that were raised in there.

We were told by Governor McNutt that the producers intended to make a fight at the hearing upon any attempt by the Committee to impose censorship of the screen, that they intended to make the same kind of fight that Wendell Willkie had made when he represented the industry before the Nye Committee at an investigation of the motion picture business [322] in 1941.

I think we, representing the employees, expressed our pleasure to know that the producers were going to make that kind of a fight before the Committee.

It was Governor McNutt, I believe, who said, "Well, really, you gentlemen representing the employees are in a better position than we are, because we are embarrassed. We have spent most of the afternoon reviewing the testimony of one producer who testified at the hearing of the Committee in April or May or June out here in Los Angeles, and that we are embarrassed by the fact that he shot his mouth off and you gentlemen don't have that em-

(Testimony of Robert W. Kenny.)

barrassment when presenting whatever you have to present."

The meeting lasted about an hour. I recall that towards the end of the meeting I said that my clients had been troubled by a rumor that was circulating in Hollywood that a blacklist was going to be imposed by the industry upon these men because the Committee was demanding a blacklist of men in the industry who were in disfavor of the community, and I remember Mr. Eric Johnston saying, just as the meeting was breaking up, he said, "You don't need to worry about that. You can tell your men that as long as I am president of this Association, there will never be a blacklist." And I remember, then, Mr. Bartley Crum shaking hands with him and saying, "Eric, I knew there was nothing to such a rumor. I knew that [323] you, Eric, would never stand for anything as un-American as a blacklist."

I think the meeting broke up, then, and one member of the group in Governor McNutt's apartment asked for additional copies of the memorandum we had submitted, and on going back to the room occupied in the same hotel by Mr. Cole, we sent up by messenger additional copies of this instrument.

Q. (By Mr. Katz): Now, did any of the persons there present make any statement on behalf of either Loew's or the Motion Picture Producers' Association to the effect that if any of the men took the position outlined in the telegram, which is Exhibit 4 for identification, that the Constitution prohibited the House Committee from inquiring into matters of thoughts, speech, opinion or association, that the in-

(Testimony of Robert W. Kenny.)

dustory or Loew's would in any way look with disfavor or penalize any of its employees who took that position?

A. No. No such statement was made.

Q. Was there any statement made in answer to the position that the investigation by the House Committee was unlawful because its real purpose was to control the conduct of motion pictures through political intimidation and censorship?

Mr. Walker: May it please the court, we haven't objected heretofore but, these are all leading questions.

The Court: Yes. You are dealing with a very able lawyer, [324] and I claim credit for having helped to educate him.

Mr. Katz: You mean Mr. Kenny and not me, Judge?

The Court: Yes, I mean "Judge" Kenny. He was one of my students. In fact he honors me by saying that he had only two teachers at law school and I was one of them, and so he can take care of himself. He has a good memory and he shouldn't be asked leading questions. He can state them. I will sustain the objection.

Q. (By Mr. Katz): Following the statement of Mr. Johnston which you relate, when he said there would be no blacklist as long as he was president and you could tell the boys not to worry, did you so report to Mr. Cole? A. Yes, I did.

Mr. Katz: At this time I offer into evidence as plaintiff's exhibit next in order the document heretofore marked No. 4 for identification.

(Testimony of Robert W. Kenny.)

* * * *

Mr. Selvin: If the offer, your Honor, is limited and the jury is instructed that the telegram is not proof of any [325] of the facts recited therein, if it is offered only for the purpose of showing the nature of the information which was given to the gentlemen referred to by Mr. Kenny, then we have no objection to the telegram alone.

The Court: Did you ladies and gentlemen hear the statement that Mr. Selvin just made? All right.

I'll adopt his statement as my admonition to you, and you are to consider that this is offered only for the limited purposes which he has stated in his statement. Well, "statement" is not a good word there.

Mr. Katz: Well, it is limited for the purposes of showing what the attorneys for Mr. Cole stated to the producers the day before the meeting opened, as to what their position was.

The Court: Yes, and they are not to be considered as to going to the correctness or incorrectness of their position.

* * * *

EXHIBIT No. 4

TELEGRAM

October 19, 1947

Honorable John Parnell Thomas, Chairman
House Committee on Un-American Activities
House Office Building
Washington, D. C.

Please take notice that the undersigned, as counsel for Alvah Bessie, Herbert Biberman, Berthold

(Testimony of Robert W. Kenny.)

Bercht, Lester Cole, Richard Collins, Edward Dmytryk, Gordon Kahn, Howard Koch, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Lewis Milestone, Samuel Ornitz, Larry Parks, Irving Pichel, Waldo Salt, Adrian Scott, Robert Rossen, Dalton Trumbo, will move on Monday, October 20, 1947, at the opening of the hearings relating to the investigation of the motion picture industry for an order or direction squashing the subpoenas heretofore served by the Committee upon the above-named and setting aside the service thereof upon each of the following grounds:

First: This investigation is unlawful because its real purpose is to control the content of motion pictures through censorship and political intimidation; and because its aims to deprive the American people of their free right to select those motion pictures they desire to see, without interference by governmental officials, high or petty.

Second: The Committee is without constitutional power to censor the political, economic or social ideas of the American people and constitutes in effect an unlawful inquisition.

Third: The statute and resolution purporting to establish the Committee on Un-American Activities are unconstitutional and void.

Fourth: The Committee is prohibited by the first amendment to the Constitution from inquiring into matters of thought, speech, or opinion and any such legislative inquiry encroaches upon the rights of persons guaranteed by the fundamental law.

Fifth: The Committee does not have any lawful

(Testimony of Robert W. Kenny.)

legislative purpose. Its sole purpose as exemplified by its acts and conduct is to stifle free thought and expression.

Sixth: The Committee is without power or authority to issue the subpoenas herein or compel the appearance and testimony of the persons to whom they were severally directed.

/s/ BARTLEY C. CRUM,
San Francisco,

/s/ ROBERT W. KENNY,
Los Angeles,

/s/ MARTIN POPPER,
Washington, D. C.

Counsel:

/s/ BEN MARGOLIS and

/s/ CHARLES J. KATZ,
Los Angeles,

/s/ SAMUEL ROSENWEIN,
New York City.

Q. (By Mr. Katz): All right. I show you now, Judge Kenny, plaintiff's Exhibit 4 in evidence and ask you to read [326] it and tell us whether after you have read it your recollection is refreshed as to anything else that may have been said or done at that meeting.

A. Well, Mr. Katz, nearly all of those—there are about five or six subject matters here and nearly all of those were generally discussed. I don't recall all I said there, because Governor McNutt might have

(Testimony of Robert W. Kenny.)

discussed phases of it, but all of these matters in here were a subject of a general conversation amongst both groups that were there in the room.

Q. (By the Court): So that by the time you had finished, the members there, including the representative of the defendant Loew's, Mr. Benjamin had been informed of every one of the grounds upon which your position is based which are set forth in this telegram? A. That is right, yes.

The Court: All right, all right. Then we don't need to read it at the present time. The jury will have it in their deliberation.

* * * *

[327]

Cross-Examination

By Mr. Selvin:

Q. Mr. Kenny, this conference to which you have referred, as I understood it, took place on Sunday night, the day before the hearing opened, is that right? A. That is right.

Q. So that at that time, no one had actually appeared before or testified before the Committee, is that right?

A. No one had appeared at that particular hearing.

Q. At Washington?

A. The so-called Hollywood hearing in the spring had taken place.

Q. I understand that, but that was a closed hearing which you did not attend?

A. That is right. I was not invited.

Q. But at the Washington hearing, no one had yet appeared or testified at the time you held this

(Testimony of Robert W. Kenny.)

meeting with Mr. Johnston, Mr. McNutt and Mr. Benjamin? A. That is right.

Q. You appeared at this meeting, as I understand it, in company with a number of your co-counsel, all of whom represented the same people you were representing, is that right? A. That is right.

Q. That is, Mr. Bartley Crum? A. Yes.

Q. That is the co-counsel? A. Yes.

Q. Mr. Charles Katz? A. Yes.

Q. Mr. Ben Margolis? A. Yes.

Q. They are all of Los Angeles. Mr. Crum is also of New York? A. That is right.

Q. And then also was with you as co-counsel Mr. Martin Popper of Washington, D. C.? A. Yes.

Q. And Mr. Samuel Rosenwein of New York City? A. Correct.

Q. Had you appeared at this meeting in response to any request or solicitation of Mr. Johnston, Mr. McNutt or Mr. Benjamin?

A. I really can't tell you how that meeting was arranged. I know that we wanted the meeting and I don't know whether the other group wanted the meeting, too, or not, but I remember that we wanted the meeting and I think that Mr. Bartley Crum set up the arrangements for it. I don't know whether—I do know that we wanted it, anyway.

Q. At any rate, you would not say that the meeting was not requested by one of you, that is, one of your co-counsel? [329]

A. My impression is that we wanted it and some of us requested it, but in any case, we were not

(Testimony of Robert W. Kenny.)

unwelcome when we arrived, it was by prearrangement; we didn't barge in.

Q. But the meeting was entirely free and amicable? A. Oh, absolutely.

Q. I suppose that all of you gentlemen, the six of you, came in and someone identified them to Mr. Johnston, Mr. Margolis, Mr. Benjamin and Mr. McNutt?

A. Well, I think I introduced the gentlemen. I had known Governor McNutt for several years and I think I handled the introduction.

Q. And did you tell them that you gentlemen were there representing Mr. Cole and others, or did you mention the names of the others whom you were representing?

A. Well, I think the document that we had indicated it. I think it was known who I represented. I don't know that we read off the list of all of those who we represented, but it was known we represented Mr. Cole.

Q. Then, it is a fact that you say that there was no express reference, but it was understood as to whom you represented? A. Yes.

The Court: I have seen the letter, which letter gives all the names, including Mr. Cole.

Mr. Katz: Yes, your Honor. [330]

The Witness: I don't know that we elaborated on the letter.

Q. (By Mr. Selvin): What I want to make perfectly clear is to eliminate any impression that I am sure might have been unwittingly derived from your direct testimony that you introduced these gentle-

(Testimony of Robert W. Kenny.)

men as representing Mr. Cole and certain anonymous other persons? A. Oh, no.

Q. At that time Mr. Cole was one of a number of people you represented?

A. That is right.

Q. And that fact was either told to Mr. McNutt, Mr. Benjamin and Mr. Johnston or it was taken for granted? A. Yes, correct.

Q. And in the course of that meeting, you presented to them a copy of this telegram, plaintiff's Exhibit No. 4, is that right?

A. Yes, I think that was right at the start of the meeting.

Mr. Selvin: And since the telegram has not been read, I think I might perhaps summarize it. This is a telegram dated October 19, 1947, and addressed to the Honorable John Parnell Thomas, Chairman of the House Committee on Un-American Activities, is that right? A. Yes. [331]

Q. Now, while it was in the form of a telegram, it was and intended by you to be a notice of a formal motion which you planned to make on behalf of the people whom you represented when the committee began its hearings, is that right?

A. That is right.

Q. And the purport of that motion was to procure an order from the committee squashing as I think they say in the telegram—

A. That was Western Union. I said, "quashing."

Q. Very well, sir.

Q. (Continuing): Quashing these subpoenas

(Testimony of Robert W. Kenny.)

that have been served upon the clients and the six gentlemen you represented? [332]

A. Yes. That was the purpose of the—

Q. And those clients were the people named in the telegram, is that right? A. Correct.

Q. Mr. Alvah Bessie? A. Yes, sir.

Q. Mr. Howard Biberman?

A. Herbert Biberman.

Q. Herbert Biberman? A. Yes.

Q. Berthold Bercht? A. Bercht, yes.

Q. Lester Cole? A. Correct.

Q. Richard Collins? A. Yes.

Q. Edward Dmytryk? A. Yes.

Q. Gordon Kahn? A. Yes.

Q. Howard Koch? A. Yes.

Q. Ring Lardner, Jr.? A. Yes.

Q. John Howard Lawson? [333]

A. Yes.

Q. Albert Maltz? A. Yes.

Q. Lewis Milestone? A. Yes.

Q. Samuel Ornitz? A. Right.

Q. Larry Parks? A. Yes.

Q. Irving Pichel? A. Yes.

Q. Waldo Salt? A. Yes.

Q. Adrian Scott? A. Right.

Q. Robert Rossen? A. Yes.

Q. And Dalton Trumbo? A. Yes.

Q. All of those men were represented by all of the six of you who were there talking to Mr. Johnston, Mr. McNutt and Mr. Benjamin, is that right?

A. Yes, they were represented by myself, Mr.

(Testimony of Robert W. Kenny.)

Bartley Crum, the gentleman here, and the New York group of lawyers.

Q. Now, that motion to quash which was the subject [334] of this telegram and the subject of discussion that you have mentioned was in fact made before the Committee, was it not?

A. It was made the following morning.

Q. And you argued the motion, presented your views to the Committee?

A. I handed the motion in, but was not permitted to argue it.

Q. You were not permitted to. However, you filed one brief and then somewhat later a supplemental brief, is that right?

A. The following week on Monday, that is, on Monday the 27th, we had another motion to call back witnesses who had testified in the previous week, to submit them to cross-examination, to give us the right to be confronted with witnesses and at that time we renewed, when we made this motion to cross-examine we renewed our previous motion to quash the subpoenas.

Q. And that had been done before any of the men whom you had represented had testified before the Committee?

A. That is right.

Q. And that motion, or both of those motions were denied by the Committee?

A. They were.

Q. Now, at this meeting at the Shoreham, was there in the discussion that you had with Mr. Johnston and the [335] others, any reference to the

(Testimony of Robert W. Kenny.)

I know that we had two purposes for the discussion. One was to show the producers what we were going to do. We knew they were our employers. We showed that and the other thing that was to ask if there was anything to this rumor that our men were going to be blacklisted and they told us that they wouldn't be blacklisted, that we need not worry about that rumor. [338]

* * * *

Q. (By Mr. Selvin): Would you say that a request was not made at that meeting that the producers join in that action which you indicated you proposed to take before the Committee on the following day?

A. This was a motion to quash subpoenas, as I recall it. I mean it was a different kind of a situation as I recall it legally than was confronting the producers. I don't think there was a request made. It might have been a request to take a similar position and as I say, [339] the producers said that they were going to make a fight on the matter of censorship of the screen.

Q. (By Mr. Selvin): Did anyone at that meeting representing the producers say to you that they were going to make a fight upon the authority or power or right of the Committee to hold the hearing?

A. No. They were going to make a fight on the right to control the conduct of motion pictures.

Q. What they said in effect was that they were going to make a fight to demonstrate that there

(Testimony of Robert W. Kenny.)

had been no Communistic propaganda in their pictures and that they didn't want to be controlled by the Committee or by the Government in the content of their pictures?

A. Well, the last part is what their fight was, was that no Government agency should be allowed to stand between them and the American public, that is, no committee of Congress should dictate what kind of pictures they thought the American people ought to see and what they hadn't ought to see.

Q. In other words, what they said to you in effect was that their position was going to be that there should not be as a result of this hearing or otherwise any situation which would impose Government or federal censorship upon the motion picture screen?

A. That is right. They said that. [340]

Q. But they did not say to you, these representatives of the producers, that they were going to attack the power or the right of the investigation of the Committee, the right of the Committee to make the investigation which you all understood it was proposing to make?

A. Oh, on the contrary. The investigation into the conduct of motion pictures was a thing that they were going to attack.

Q. Not the right of the Committee to make it?

A. Well, they were going to fight that kind of an investigation, certainly.

Q. What they told you was that they were going to take the position that there had been no Com-

(Testimony of Robert W. Kenny.)

munistic propaganda in pictures and that they would oppose any efforts on the part of the Committee or anybody else to bring about a situation where their right to produce such pictures as they saw fit would be limited, impaired or censored?

A. By a Committee of Congress.

Q. Or by any other branch of government?

A. Well, that did not come in. We had a Congressional hearing set for the following morning. That is what we were talking about.

Q. In response to a statement asked as to what the attitude of the producers was going to be, didn't Mr. Johnston or one of the other gentlemen say to you in effect [341] that they were not in a position to oppose the power or right of the Committee to make the investigation, that they had publicly welcomed the investigation and would take the position again publicly before the Committee, but that all they insisted upon was that any charges that their pictures had been infiltrated by Communistic propaganda were not true?

A. He said that they were embarrassed in taking an all-out position against the Committee, because one of their members, a producer, had shot his mouth off at the previous hearing and they were worrying about the testimony that he had given.

Q. As I understand you, Mr. Kenny, I also understood you to say that this meeting lasted about an hour and I assume that the producers' representatives had something more to say than the fact that this one producer had shot his mouth off. And

(Testimony of Robert W. Kenny.)

my question is, did they not tell you that they were not in a position to oppose the power or right of the committee to hold the investigation and on the contrary would publicly welcome it and would certainly welcome it publicly?

A. Well, nobody was welcoming that investigation that night and nobody said that to us.

Q. That is, all I am trying to find out is what your recollection is what was said to you.

A. My recollection is that the producers were not going to—I think I can concur with you that the sense of the meeting was that the producers were not going to attack the power of the committee to swear witnesses and inquire of those things that were proper to inquire, and that was our position, too.

Q. And did anyone on behalf of the producers say that any witness produced from the producers' ranks would decline to, refuse to answer any question asked by the committee? A. No.

Q. I think you said on direct that after this meeting you had reported the result of it to Mr. Lester Cole. I assume [343] Mr. Cole and your other clients knew that the meeting was going to be held before it was held.

A. They were waiting for us until we came back downstairs. They waited that hour and then some.

Q. And by "they," you mean all of them?

A. Well, I do not mean all, but Mr. Cole, certainly.

Q. Well, was Mr. Bessie waiting for you?

A. Yes, Mr. Bessie, and I would say that nearly

(Testimony of Robert W. Kenny.)

all of the gentlemen that you have mentioned with, oh, maybe one or two exceptions.

Q. Now, of the gentlemen that I have mentioned as being represented by you, the fact is that only ten of them were actually called and testified before the committee, is that right?

A. No, that is not correct.

Q. I mean eleven of them.

A. There were eleven, yes. The other gentlemen were in attendance.

The Court: Q. They were not called?

A. They were subpoenaed.

Q. But they were not called?

A. And they waited around that week and they were not called.

Q. (By Mr. Selvin): The ten who were actually called and testified—that is the eleven who actually were called [344] and testified, were Mr. Bessie, Biberman—

A. Yes.

Q. Mr. Bercht? A. Yes.

Q. Mr. Cole? A. Yes.

Q. Mr. Dmytryk?

A. Edward Dmytryk, yes.

Q. Mr. Lardner?

A. Ring Lardner, Jr.

Q. John Howard Lawson? A. Yes.

Q. Albert Maltz? A. Yes.

Q. Samuel Ornitz? A. Yes.

Q. Adrian Scott? A. Adrian Scott.

Q. And Dalton Trumbo?

A. That is right.

(Testimony of Robert W. Kenny.)

Q. Of those eleven, Mr. Bercht was not subsequently cited for contempt?

Mr. Katz: Just a moment. We object to that upon the ground——

The Court: Well, I will sustain the objection. We are [345] not concerned with the fate of any of the others.

Q. (By Mr. Selvin): Now, after this meeting was held, you reported the result of it, you say, to Mr. Cole. Was he the only one of your clients to whom you reported it?

A. Oh, no. As I say, I think I told everybody—we had a large room down on about the second floor and the meeting was about on the sixth floor—there was a room full of people there.

Q. (By Mr. Selvin): So that at this particular time, which was the night before the hearing, Mr. Cole had not been singled out from any of the rest of your clients, he stood substantially in no different position from any of the others?

Mr. Katz: Just a moment. We object to that on the ground it is improper cross-examination.

The Court: I don't know what—I will sustain the objection—the object of the question as to—yes, I will sustain the objection.

Mr. Selvin: I don't wish to argue your Honor's ruling or your admonition not to argue after a ruling, but I could state the purpose. I think that is all.

The Court: I don't know. If you indicate what you seek to show, I will allow him to answer the

(Testimony of Robert W. Kenny.)

question. I mean you are mysterious about it. He may answer it. I will overrule the objection. Go ahead.

The Witness: I don't know. [346]

The Court: All right.

Mr. Katz: I withdraw the objection for the record.

The Court: Now, is everybody satisfied? "I don't know" is the answer. That is always the case, always the case. It is an illustration of mountain labor and producing a little mouse. We argue about a point and then the answer is "I don't know" or "I can't remember."

Mr. Selvin: I might call your Honor's attention to the fact that I did not argue it.

The Court: All right. Are you through?

The Witness: I hope so.

Mr. Katz: That is all, Mr. Kenny.

The Court: Ladies and gentlemen of the jury, I should make some observations for the benefit of some of you. We are talking about so many meetings and committees, and so forth, we ought to bear in mind that there is only one governmental committee that we are talking about, and that is this Un-American Activities Committee, and the other meetings were between private persons, and the mere fact that you mentioned that Governor McNutt was there or Justice Byrnes was there or Judge Kenny was there should not indicate to you that it was an official meeting. All these gentlemen have occupied official positions, just as Mr. Justice

Byrnes was a Justice of the Supreme Court of the United States and afterwards became Secretary of State. You can call him Mr. Secretary [347] of State. And Mr. McNutt was governor of Indiana, first, and then governor of the Philippines—not governor of the Philippines—commissioner general of the Philippines, after that partial independence was given to the Philippines.

Judge Kenny was a judge of the Superior Court of this county. He resigned to be elected state senator.

And all of these gentlemen have earned the right to be called by the name of judge, but they were not there in any official capacity representing either the state or the government. They were there as private attorneys who were then representing private parties.

I thought I would make this clear because so many judges' names and governors' names are coming in. Once a judge, always a judge. After you have been a judge, you are entitled to be referred to as judge the rest of your life and that includes everybody from justice of the peace up. All right. [348]

LESTER COLE,

the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. Lester Cole.

(Testimony of Lester Cole.)

Direct Examination

By Mr. Katz:

Q. You are the plaintiff in this action, sir?

A. I am.

Q. What is your age? A. I am 44.

Q. When did you first go to work in the motion picture industry? A. About the year 1927.

* * * *

Q. (By Mr. Katz): The question I had asked you I will repeat. When did you first go to work in the motion picture industry?

A. I went to work in 1927 as a day laborer and later as an extra.

Q. In 1929, did you get some work at Loew's, Incorporated? A. Yes; I did. [351]

Q. What work did you do there then?

A. I was engaged for a brief period of time in the story department as a reader of story material.

Q. When did you first become a writer of motion picture scripts, of scenarios?

A. In the year 1932.

Q. What other experience did you have in the theatre before you became a screen writer, in addition to that of being a day laborer and an extra?

A. I was a stage manager for New York theatrical companies. I acted as stage director for Sid Grauman at the Chinese Theatre when it first opened in 1928. I worked for various theatrical companies both here and in New York. Then, in 1932, after a play of mine had been produced and another one had been considered for production,

(Testimony of Lester Cole.)

I was given a contract to come out to Paramount Pictures as a screen writer.

Q. In what studios, subsequent to 1932, have you been employed as a writer?

A. At Fox, at Republic, at Universal, at Warner Brothers, at Columbia, United Artists and Metro-Goldwyn-Mayer; I believe every major studio with the exception of RKO.

Q. Metro-Goldwyn-Mayer has been identified as the defendant here, Loew's, Incorporated. [352]

A. Yes; that is correct.

Q. In 1945, did you go to work for Loew's, Incorporated? A. Yes; I did.

Q. Was that on a written term contract or was that on a week-to-week basis, free lance?

A. That was on a week-to-week free-lance basis.

Q. And what was the name of the producer for whom you worked in 1945, when you first went to work at Loew's as a writer?

A. Mr. Jack Cummings.

Q. And what screen play did you work on for Mr. Cummings when you first went to work at Loew's, Incorporated?

A. It was a screen play entitled *The Romance of Rosy Ridge*.

Q. And late in 1945, were there any discussions between you and Mr. Cummings in connection with the matter of putting you under a contract for a term of years? A. Yes; there was.

Q. Will you state what Mr. Cummings said to you? A. Well, I had completed——

Mr. Walker: May it please the court, I would

(Testimony of Lester Cole.)

like to enter an objection that this is immaterial, what Mr. Cummings said to him.

Mr. Katz: We don't seek to vary the agreement at all. It is simply to show the course of conduct right down through [353] the years.

The Court: I think you should limit it to the line of inquiry that you elicited from the other persons.

Mr. Katz: I will confine it specifically to that but it is the same general subject.

The Court: Overruled.

Mr. Katz: Tell us what your conversation was with Mr. Cummings, bearing in mind what was said by the court.

A. He had expressed great satisfaction with my work with this script and also another script, *Fiesta*, with which they had had trouble. It was slated to go into production within six or seven weeks, an expensive production, and I was called upon to be of what assistance I could. And they were so satisfied with my work there that Mr. Cummings recommended to the studio that I be placed under a term contract there.

Q. Were you then, and following the discussion with Mr. Cummings, placed under the contract which is Plaintiff's Exhibit No. 2 in evidence?

A. Yes; I was.

Mr. Katz: Judge Yankwich, there are some portions of this contract I would like to read, very briefly. I don't suggest this is necessarily the best time but they are of such importance—they will be very brief.

(Testimony of Lester Cole.)

The Court: If they are on the basis of questions, go ahead. [354]

* * * *

[Portions of Plaintiff's Exhibit 2 were read to the jury.]

* * * *

The Court: Have you read the morals clause?

Mr. Katz: No; I haven't.

The Court: After you read that part, it should be brought to the attention of the jury, that clause, about what rights existed under suspension, after you are through with that, because it may possibly become a question of instruction at the proper time.

* * * *

[357]

Mr. Katz: My colleague has found it. It is page 12.

"During the period of any such suspension, refusal to pay or leave of absence the employee shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of [359] the producer first had and obtained."

Is that the part?

The Court: That is right.

Mr. Katz: Now, is there any other part you would like to have me read?

Mr. Selvin: No.

The Court: Let's go on. They can read from the contract later on if they want to.

Q. (By Mr. Katz): Mr. Cole, after you signed the contract, which is Plaintiff's Exhibit No. 2, did you continue to work as an employee of Loew's?

(Testimony of Lester Cole.)

A. Yes; I did.

Q. And, early in 1947, did you have any discussions with any of the executives of Loew's Incorporated about the matter of an upward revision of Plaintiff's Exhibit 2? A. I did.

Q. First, tell us the producer or executive with whom you had such a discussion?

A. With Mr. Sam Katz, the executive producer in charge of the unit in which I was working.

Q. And where did that conversation take place?

A. In his office.

Q. Will you be good enough to tell us if there was anyone else present?

A. I believe that Mr. Nicholas Nayfack, his assistant, [360] was present.

Q. Will you state the substance or effect of what you said to Mr. Sam Katz and what he said to you at that time and place?

Mr. Walker: That is objected to on the ground that any previous negotiations were merged in a written contract.

* * * *

The Court: I will sustain the objection at the present time.

Q. (By Mr. Katz): Did you have a conversation with Mr. Sam Katz, in September, 1947, in connection with the question of your employment and the matter of any alleged political or trade union affiliations of yours?

Mr. Walker: I make the same objection, your Honor.

(Testimony of Lester Cole.)

The Court: No. I think that is material because one of the questions which was propounded by the Committee related to his membership in the Screen Writers' Guild. And you will notice, by blanketing his conduct, it included everything [361] that he did by act, words or music. So I think that is permissible. You may answer.

* * * *

Mr. Katz: Let me reframe it.

Q. In 1947, did you have a conversation with Mr. Sam Katz in connection with your employment at Loew's and the question of your political affiliations and your activity in the Screen Writers' Guild?

A. Yes; I did.

Q. Will you state what that conversation was?

The Court: First, tell us where it was.

Q. (By Mr. Katz): Yes; where?

A. It occurred in Mr. Katz' office.

Mr. Katz: By the way, can we get Mr. Sam Katz' title?

Mr. Selvin: He was at that time a producer and he is not you and not related to you.

A. I knew him as the executive producer over there or [362] four producers in the unit in which I worked.

Q. (By Mr. Katz): Now, go ahead with the conversation.

A. I recalled to Mr. Katz, Mr. Sam Katz, that, at the time that I signed my contract in 1945, there had been a disagreement and misunderstanding as to the terms of that contract. I had understood that the con-

(Testimony of Lester Cole.)

tract was to call for more money than it finally came through in its written form. I told him that I believed or my understanding was that it should have been \$1,250 a week and not \$1,150 as it came through. He replied to me that, in getting the contract, he had had some opposition in the executive board or the council, from certain members of that council, because of my alleged political affiliations and my activities within the Screen Writers Guild, where I had been quite active. And he asked me at that time please to accept the terms as they were, and that within a year, if my work was satisfactory, and he felt confident it would be, he personally would see that the contract was revised upward and that the money that was lost during that period would more than be made up to me.

Q. Did you thereafter have a conversation with Mr. Vetluggin in connection with an adjustment of the contract and in connection with your trade union and political activities? A. Yes; I did.

Q. And where did that conversation take place?

Mr. Walker: I should like to enter the same objection as previously made.

The Court: If it is limited to the trade union, all right.

Mr. Katz: And the other political activity.

The Court: Yes; if limited to those activities.

Mr. Katz: It would be difficult for Mr. Cole to cut through the conversation and pick that out.

Q. Will you try to bear the court's admonition in mind?

(Testimony of Lester Cole.)

The Court: The objection is overruled.

A. This conversation took place in relation to the upward revision of my contract, which at that time had been stalling along for a couple of months, and I asked Mr. Vetluggin when I saw him whether or not the refusal or the apparent refusal to conclude the negotiations on the contract was in any way connected with the fact that I had been extremely active in my trade union, the Screen Writers Guild, and the alleged political affiliations which had been rumored about. He assured me that this was not the case and that it was a question of how much money I was then asking for my services and whether or not the company was in a position to make such an adjustment.

Q. (By Mr. Katz): Did you thereafter, following that conversation, Mr. Cole, talk with yet another executive of the studio, at which time the matter of your remaining at the [364] studio and your getting an even better contract, and the problem of your trade union or asserted political affiliations, were discussed?

Mr. Walker: I assume, your Honor, it is not necessary for me to repeat the same objection.

The Court: No; not to the same type of questions as long as they are limited as I have indicated. The objection is overruled.

A. Yes; I did.

Q. (By Mr. Katz): Will you state the name of that official? A. Mr. Benjamin Thau.

Q. And where did that conversation take place?

A. In Mr. Thau's office.

(Testimony of Lester Cole.)

Q. And who was present?

A. Mr. Willner, my agent, Mr. Thau, and Mr. Larry Weingarten, whose exact title at Metro I do not know, but I know that he is an executive and, I believe, a member of the council.

Q. What script were you working on at that time?

A. I was working on the script *The High Wall*.

Q. Will you be good enough to tell us what was said at that conversation in the office of Mr. Thau?

A. I believe that by this time more than four or four and a half months had passed since I first made my request, [365] and, after some pleasantries, I tried to explain to Mr. Thau that I was extremely concerned because a subcommittee of the House Un-American Activities Committee had been out here, during the period in which the contract was not negotiated; that my name had been mentioned in some papers and by the Committee in some of their secret hearings that I was slated to be ousted from the industry because of my political or asserted political activities. And I said to Mr. Thau, "If this is the case, if this is the reason why Metro is not concluding these negotiations, I am in a position now to get another job and I believe it much better money and, therefore, although there are five or six months left of this contract, I will release you from it if you will release me, because I do not want to continue in this way." Mr. Thau assured me that there was nothing, as far as the studio was concerned, which took into consideration these matters which came up in the newspapers, and that the matter was one which dealt

(Testimony of Lester Cole.)

with the fact that Mr. Nicholas Schenck, the president of the concern, had to pass on any increase in salary over \$50 a week, and that money had been frozen in England; that the economic situation was difficult for the studios at that time, but that he recognized the justice of my request and that he would do his best to see it was brought about. He felt it should not be, if the contract were not rewritten, in terms of actual upward revision but in terms of other arrangements, and that he was going to speak to [366] Mr. Louis B. Mayer about it and that he believed Mr. Mayer would want to have a talk with me about this and, after that, that he felt the matter could be successfully concluded.

Q. Did you see a Mr. Vetluggin at about the same time, yet another executive?

A. No. I had seen Mr. Vetluggin previously.

* * * *

Q. (By Mr. Katz): Will you state where that conversation took place and who was present and what was said and who Mr. Vetluggin was, so that the cast of characters is kept clear?

A. Mr. Vetluggin, to the best of my knowledge, was an executive at the studio in charge of—I must confess I don't know exactly what he was in charge of, except I know he had something to do with the hiring and firing of writers. There were so many executives at Metro that I don't think I learned exactly where each one fit in. I don't know except that my agent told me that he was handling this matter.

(Testimony of Lester Cole.)

are coming in to see me today and I intend to tell them the same thing."

Q. Will you go on with the balance of the conversation with Mr. Mayer?

A. Yes; I will. Mr. Mayer then said he wished that all of this business, talk about people being Communists, did not arise; that his business and mine was making pictures. And he felt this was an important thing and I agreed with him. And I told him that the whole question of people being called Communists came up in the motion picture industry, and started with a group of people, one of whom was James Kevin McGuinness, who was an executive at that studio down there for many years and previously was a writer, and that Mr. McGuinness years ago had been part of a group which attempted or which had set up an organization called the Screen Playwrights, which had been, in fact, a company union set up to combat the Screen Writers Guild, the organization of which I was a member, and that this Screen Playwrights was defeated before the National Labor Relations Board, and the Screen Writers Guild was set up as a bargaining unit for writers, but the animosity which had been created at that time had never ceased, and that it was a technique on the part of Mr. McGuinness and his followers to smear all of his opponents by calling them Communists. And I pointed out that Katherine [370] Hepburn had been so smeared and that Frank Sinatra had also been called that and so had other people, in fact, anybody who had come down at any time for any-

(Testimony of Lester Cole.)

thing which I believed was important, that is, being of whatever service that anyone could as far as the underprivileged were concerned; that the technique against such people was to call them Reds, and that, as far as that was concerned I was in with Hepburn, with President Roosevelt and with Shirley Temple, who had also been smeared, in some pretty good company. Mr. Mayer at that point told me that he recognized the role that Mr. McGuinness had played in all of this. He spoke violently and blasphemously against Mr. McGuinness and he said that he was not going to be influenced by any such stories; that he didn't care what a man was and he didn't care what a man's politics were. [371] He did hope, however, that I would somehow curtail my activities in the Screen Writers Guild because he had plans for me to become an executive, to assist him in the studio. I thanked him. I was flattered. And the conversation concluded. He put his arm around me and led me to the door. I reminded him at that point that the reason I came in was in regard to the upward revision of my contract, which, until then, had not been mentioned. He told me not to worry about that; it would be taken care of. And it was.

The Court: Is that as far as you remember of the conversation?

A. That is what I remember, your Honor. [372]

* * * *

(Testimony of Lester Cole.)

December 10, 1948—10:00 o'clock a.m.

LESTER COLE

the plaintiff, being recalled, testified as follows:

Direct Examination—(Resumed)

By Mr. Katz:

Q. You were being interrogated yesterday about your conversation with Mr. Mayer in 1947. During that conversation, what was said by you or by Mr. Mayer in connection with the matter of his family or your family?

A. Mr. Mayer told me a rather lengthy autobiographical account of his life, with the intention of impressing upon me—

Mr. Walker: Just a moment, please—

The Court: Just what he said.

Q. (By Mr. Katz): Just tell what he said, in substance.

A. In substance, he said that a man who started from lowly beginnings and achieved success, as he had done, should guard that success, should look after himself. I replied by telling him that I, too, had come from a poor family and I related some of the incidents in my life. And I explained to him how under different circumstances people [378] can form different opinions and how I had formed such different opinions with a member of my family. And I explained to him that this was part of the things that happened to people as they either went into business or continued to work for employers, but that the important thing was that with such differences of opinion we found that this was the very

(Testimony of Lester Cole.)

essence of our lives, of the American way of living, and the main thing was to be tolerant of the different positions. And I said to him that he and I had different positions and that I respect his and that he respected mine, he said. I further said that this was quite different from the position taken by the Un-American Activities Committee, which, in my opinion, was attempting to prevent this difference of opinion which had been the traditional American way but, rather, to make everyone conform to what they believed was the only opinion that should be held by people. And in that he agreed with me.

Q. Now, following that conversation with Mr. Mayer—it was before you were subpoenaed by the House Committee, was it not?

A. Yes; it was.

Q. It was at that same conversation that Mr. Mayer related to you what Mr. Mannix had told the representatives of the House Committee who were demanding your discharge?

A. That is correct. [379]

Q. Following that conversation with Mr. Mayer, did you go to Mexico, with Mr. Jack Cummings, on business for the studio?

A. Yes; I did. We flew to Mexico City in relation to the assignment on which we were working, the picture called *Zapata*. There I was to confer with heads of the Mexican government about making the picture in Mexico and about the various production problems which were concerned with it. We stayed there about 10 days, I believe, and returned to the studio.

(Testimony of Lester Cole.)

Q. I call your attention, Mr. Cole, to September 19, 1947. Did you on that date have a telephone conversation with Mr. Eddie Mannix?

A. Yes; I did.

Q. Will you tell us, please, what that conversation was?

A. I received a telephone call from Mr. Mannix in the studio barber shop when I was getting a haircut. Mr. Mannix said to me, "Lester, there is a United States marshal here in my outer office, who wants to serve you with a subpoena." He said, "Do you want to duck? Do you want to get out?" And I said, "Of course not." I said, "You will find me in the third chair in the barber shop. I can be identified that way." He said, "No; I don't want you to be served in a public place. Would you mind going to Mr. Hendrickson's office?" [380] Mr. Hendrickson is an executive at the studio, I believe, in charge of contracts. I don't know whether he is an attorney or not but he handles the legal aspects of contracts. He told me to go to Mr. Hendrickson's office. I had had an appointment to be in Mr. Hendrickson's office that morning and, when I left the barber shop, I went to Mr. Hendrickson's office. There the United States Deputy Marshal was waiting and, in Mr. Hendrickson's presence, the Marshal identified me as Lester Cole and handed me the subpoena from the House Un-American Activities Committee.

Q. Was Mr. Hendrickson, the head of the contract department of the studio, present at the

(Testimony of Lester Cole.)

time you were handed this subpoena from the House Committee? A. Yes; he was.

Q. I have shown counsel this instrument and I will ask you whether this is the subpoena with which you were served. A. Yes; it is.

Mr. Katz: I ask, Judge Yankwich, that this be admitted into evidence as plaintiff's exhibit, I believe, No. 5.

The Court: All right; it may be received.

The Clerk: Plaintiff's Exhibit No. 5 in evidence.

Q. (By Mr. Katz): After you were thus served with a subpoena which is now plaintiff's Exhibit No. 5, did you have a conversation with Mr. Hendrickson in his office at Loew's [381] Incorporated?

A. Yes; I did.

Q. Will you tell us what was said during that conversation?

A. Mr. Hendrickson said, "Now that that is over, let's get down to our business." And our business at that time was the final reading of the amendment to my contract in relation to taking up my option and the additional benefits which were guaranteed me in that amendment.

Q. That is the document which is now plaintiff's Exhibit No. 3, is that correct, which I now show you? A. That is right.

Q. And did you then, and after being thus served, and in the presence of Mr. Hendrickson and with him, review the draft of Plaintiff's Exhibit No. 3? A. Yes, I did.

Q. Had Loew's, Incorporated, as of the time

(Testimony of Lester Cole.)

you were subpoenaed and as of the time Mr. Hendrickson was reading that draft to you, yet signed plaintiff's Exhibit No. 3? A. No, sir.

Q. Had you as yet signed it?

A. No, sir.

Q. How many days after—I will withdraw that.

You were reviewing the amendment to that contract that afternoon, after the Marshal left, with Mr. Hendrickson. Now, [382] what else happened?

A. We reviewed certain aspects which had been under consideration for some time in regard to when the periods of vacation would occur. This had been put in a previous draft of the contract in a way which I considered unsatisfactory and it had now finally been changed. I reviewed it and said it was all right with me and that I was prepared to sign it. Mr. Hendrickson said, "Let's make sure about this. I want your agent, Mr. Willner, to read it over." This was then done. And, following that, I signed these contracts.

Q. At the time you signed it, had Loew's as yet signed it? A. No; they had not.

Q. Three days later did Loew's forward their signed copy to your agent, which is now part of plaintiff's Exhibit No. 3?

A. Yes; they did.

Q. That was mailed by Loew's on September 22nd, as shown by this letter?

A. That is correct.

Q. Following the service of the subpoena and the subsequent procurement of Loew's signatures

(Testimony of Lester Cole.)

to the amended contract, did you continue to work on any particular assignment at Loew's, Incorporated?

A. Yes; I did, on the assignment Zapata. [383]

Q. And did you continue to work on the picture, preparation for the picture Zapata, throughout the month of September and up until the time you left to go to Washington pursuant to the summons which had been served upon you?

A. I continued to work on it even after that, while I was in Washington.

Q. Did you, before you left to go to Washington, have a conversation with your producer, Mr. Cummings, about continuance of work on Zapata?

A. Yes; I did.

Q. If you did, tell us what your conversation was.

A. Well, the subpoena called for my appearance in Washington on the 23rd of October. It was served on the 19th of September, and that was about five weeks' time. Prior to this, it had been estimated by Mr. Cummings that at least eight to ten weeks would be necessary for the completion of that aspect of the work, which was an extended outline of the screen play. And, therefore, Mr. Cummings asked me whether I wouldn't intensify and double my efforts in getting this work done. I told him that I would and I worked day and night in order to get the work done. But by the time it was necessary for me to leave, it was still not completed.

(Testimony of Lester Cole.)

Q. Go ahead.

A. Therefore, I told him that I would work on it while traveling and whatever time I had back in Washington, and I [384] continued to do so, sending final changes and additions of scenes back to be typed by my secretary, and also had some telephone conversations for changes in earlier parts of the manuscript. This continued, I would say, for the first week that I was in Washington. About that time, I believe, within a week or ten days after I had left, the work was completed and in the studio's hands.

Q. That is, you sent this work on from Washington while you were waiting to be called?

A. That is right.

Q. On October 19, 1947, were you at the Shoreham Hotel in Washington, D. C.?

A. Yes; I was.

Q. Do you remember what that day of the week was? A. Sunday, I believe.

Q. The hearings began on Monday, October 20th. Is that the day before the hearings themselves began? A. Yes; it was.

Q. Did you at that time know, that is, on October 19, 1947, that your attorneys were going to see the representatives of the Producers Association who were then also at the Shoreham Hotel?

A. Yes, sir; I did. [385]

Q. (By Mr. Katz): And before your attorneys left to see the representatives of the producers, did you see a counterpart of this document which

(Testimony of Lester Cole.)

has been introduced into evidence as Plaintiff's Exhibit No. 4? A. Yes, I did.

Mr. Katz: I would like, your Honor, to read this in sequence at this time.

The Court: All right.

[Printer's Note: Plaintiff's Exhibit 4 was read to the jury.]

* * * *

Q. (By Mr. Katz): As I understand it, after you read the telegram which I have just read to the jury, you understood that your attorneys were going to see the producers' representatives and attorneys, is that correct? A. Yes.

Q. And that evening, did your attorneys, including Judge Kenny, come back to your suite in the Shoreham Hotel and tell you that they had seen the producers? A. Yes, they did.

Mr. Katz: I am going to be met with an objection that it is hearsay, and so I am going to anticipate it by [389] simply asking you: Did Mr. Kenny make a report to you on his conversation with Mr. Johnston, Mr. McNutt and Mr. Maurice Benjamin? A. Yes, he did.

Q. Now, you heard the report that Mr. Kenny made to you that evening, of course?

A. Yes.

Q. You heard the testimony of Mr. Kenny on the stand under oath preceding you?

A. Yes, I did. [390]

* * * *

Q. Mr. Cole, you stated that Mr. Kenny reported to you the substance of the conversations

(Testimony of Lester Cole.)

had with the producers, is that correct?

A. Yes, sir.

The Court: All right. You were here when he testified yesterday? A. Yes, I was.

The Court: You heard him give the summary of this conversation that took place, that took an hour or so? A. Yes, I did.

Q. Is your recollection of it the same as his?

A. Yes, sir.

Q. If you were asked verbatim each question or substantially the same questions he was asked, would you give substantially the same answers?

A. In substance, yes, your Honor.

The Court: In substance.

Q. Is there anything that he told you as to what took place which you did not hear him state from the witness stand, or which you could add according to your recollection?

A. Nothing that I can recall, your Honor. [392]

* * * *

Q. (By Mr. Katz): Now, as I understand it, you answered Judge Yankwich that you did hear Mr. Kenny's report and if you were asked about it, you would testify substantially as Mr. Kenny did with respect to the report he gave concerning that conversation with the producers' representatives? A. Yes.

Q. All right. Now, your subpoena called for you to testify on October 23, 1947, did it not?

A. Yes, it did.

Q. When, however, were you actually called to testify before J. Parnell Thomas, Congressman

(Testimony of Lester Cole.)

Vail and McDowell?

A. On the 30th of October.

Q. Now, before you testified on the 30th of October, was your attention called to, and did you see, first, this ad of the motion picture producers association signed by Eric Johnston which, in the interest of convenience I ask [395] be marked simply for identification at this time, Judge——

The Court: All right.

The Clerk: Plaintiff's Exhibit 6 for identification.

Q. (By Mr. Katz): Did that ad which is now Plaintiff's Exhibit 6 appear in the Washington Post, as well as the New York Times?

A. Yes, it did. I saw it in the New York Times, as well.

Q. And you saw it while you were at Washington and before you testified on the 30th?

A. That is correct.

Mr. Katz: Now, we have a stipulation, haven't we, that this is in fact the ad placed by the Motion Picture Association of America, Inc., signed by its president, Eric Johnston?

Mr. Walker: We have.

Mr. Katz: All right. Now, I offer into evidence as Plaintiff's Exhibit No. 6 in evidence the ad which has heretofore been marked as No. 6 for identification.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Plaintiff's Exhibit No. 6 was read to the jury.)

(Testimony of Lester Cole.)

In America, we hold that the individual is a higher power than the state which derives from him its own authority and must treat him accordingly. The sovereign rights and dignity of the individual supersede all else. There is no place in our society for any procedure or practice which cuts away part of those rights. There can be no such thing in America as a half-citizen.

* * *

One of the most precious heritages of our civilization is the concept that a man is innocent until he is proved guilty. This concept is so dear to us that we say it is better for twelve guilty men to escape than for one innocent man to suffer.

This is in direct contradiction to the practice of the police state. In Russia, the state has all the rights, and the individual has none. There a man is guilty until he proves his innocence, and too often innocent men are condemned before a guilty one is found.

We surround our defendants in courts of law with a multitude of protective devices. To name but a few——

We assign them counsel when they cannot themselves afford it; they have the right of cross-examination; prospective jurors can be challenged; and the judge himself can be disqualified on grounds of prejudice.

These protections and safeguards are denied or short-circuited in Congressional inquiries.

I do not suggest that investigating committees

(Testimony of Lester Cole.)

adopt and pursue the procedure of the courts. We cannot expect the identical procedure of a court of law and accomplish the purpose of a Congressional investigation.

I am suggesting only that there are too many weaknesses and evils in present procedure. I am proposing a fresh look as a basis for reform. Besides the right of the individual, there is another vital factor. Whenever a Congressional committee in its effort to expose or develop facts has injured an innocent individual, it has injured itself more. The entire institution of the Congress suffers. We arm the advocates of paternalism and the police state and undermine the legislative system.

* * *

Congress, the representative body of the people, must be scrupulous in its relationship with the people, and as an institution must be at all times above reproach.

Today, the individual is crushed in many lands. The eyes of the people of the world who want liberty and freedom look to America as the last hope and the last refuge of free and dignified men.

Congress must take positive action to re-emphasize the rights of man, the citizen.

I earnestly appeal to you to initiate this needed reform at the next session of the Congress.

/s/ ERIC JOHNSTON,

Motion Picture Association of America, Inc., 1600
Eye Street, N. W., Washington 6, D. C.

This Advertisement Is Published as a Public
Service

(Testimony of Lester Cole.)

* * * *

Q. (By Mr. Katz): As I understand it, the ad which I have just read was seen and read by you on the morning it appeared prior to your testifying on October 30th?

A. That is correct.

Mr. Walker: I don't think counsel gave us the date on which the advertisement appeared?

Mr. Katz: October 26, 1947, is the date. That was a Sunday. It appeared in a Sunday paper. I am sorry. Monday, October 27, 1947.

Mr. Selvin: In the morning.

Mr. Walker: In the morning paper.

Mr. Katz: Yes, Monday, October 27th, 1947.

Q. Now, Mr. Cole, prior to the time that you testified on October 30th, 1947, was your attention called to published statements by Paul V. McNutt, counsel for the Motion Picture Producers Association, concerning his advice with respect to a blacklist? A. Yes, it was. [402]

* * * *

Mr. Katz: We have shown the published statement of Mr. McNutt to counsel.

Mr. Selvin: Subject to correction.

Mr. Katz: With that stipulation, we offer it, subject to correction. We can check it again.

Mr. Walker: Subject to correction.

(Plaintiff's Exhibit No. 7.)

Q. (By Mr. Katz): Was this statement of Mr. Paul McNutt, counsel for the Motion Picture Producers, called to your attention and did you

(Testimony of Lester Cole.)

see it in the press in Washington, D. C., on October 22, 1947, before you testified?

A. Yes; I did.

(Plaintiff's Exhibit 7 was read to the jury.)

* * * *

Q. That statement did come to your attention?

A. Yes; it did.

Q. On October 23, 1947? [403]

A. Yes.

Q. Before you testified, was your attention called to a speech made by counsel Paul V. McNutt, for the Motion Picture Producers, over the National network, ABC?

A. Yes; it was.

Q. Did you both hear and read the transcript of Mr. McNutt's nationwide statement concerning this investigation, before you testified?

A. I heard the speech on the air and I read such sections of it as appeared in the press. [404]

* * * *

The Clerk: Plaintiff's Exhibit 7 in evidence.

PLAINTIFF'S EXHIBIT No. 7

[The New York Times, Wednesday, Oct. 22, 1947.]

At the close of the session Paul V. McNutt, counsel for the Motion Picture Producers Association, held a press conference in which he asserted the industry insisted that there was no Communist propaganda in its pictures. He stated: "As I listened to the evidence the last two days, even the most damning evidence shows that they are 98 per cent pure and that is as good as Ivory soap."

(Testimony of Lester Cole.)

Mr. McNutt, a former Governor of Indiana and former High Commissioner of the Philippines, called on the committee to furnish a list of allegedly tainted pictures, saying that the industry was ready to defend them. He declared that Representative J. Parnell Thomas, committee chairman, had turned down several requests for the list.

He said also that as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employes with the idea of denying employment to them.

Such action, he asserted, was without warrant of law and was not in accord with an announced policy of Congress or rulings of the Supreme Court, and, therefore, would involve the producers in serious legal difficulties.

Hollywood films, he declared, spoke for themselves and the American public was capable of judging them.

Mr. Katz: And this is the transcript, Plaintiff's Exhibit No. 8, of what Mr. McNutt said over the nationwide hookup over ABC, on October 22, 1947.

The Clerk: Is this admitted, your Honor.

The Court: Yes.

The Clerk: Plaintiff's Exhibit 8 in evidence.

Q. (By Mr. Katz): Did you see or was your attention called to the published statement of Mr. Paul McNutt, on October 23, 1947, to the effect that Mr. McNutt was shocked to see the violence done to the principle of free speech during the hearing this morning? A. Yes; it was. [405]

(Testimony of Lester Cole.)

PLAINTIFF'S EXHIBIT No. 8

From Hollywood Reporter

October 23, 1947

Paul V. McNutt on ABC, October 22, 1947.

“Free speech is the foundation of the American Constitutional System. The right to speak, to hear and to see, is a sacred principle with us. It sets us off from the police states where the press, the radio and the screen are shackled and enslaved. Under our Constitution, neither a Congressional Committee nor any arm of the government has a right, nor should desire, to curtail in any way the freedoms guaranteed to the people. It does not require a law to cripple the right of free speech. Intimidation and coercion will do it. Fear will do it. Freedom simply cannot live in an atmosphere of fear.

“The motion picture industry cannot be a free medium of expression if it must live in fear of a damning epithet, ‘un-American,’ whenever it elects to introduce a new idea, produce a picture typical of the status quo, or point up through a picture some phase of our way of life which needs improvement.

“Freedoms cannot be segregated and separated. If the screen’s rights of free speech are trampled on, then the rights of the press and the radio are placed in jeopardy. If the motion picture industry can be called before a committee and challenged on the content of the screen, then why not the

(Testimony of Lester Cole.)

newspaper, radio, magazine and book-publishing business? Will they be safe if some Congressional Committee is allowed to try to dictate and control the screen's content? Of course, they won't.

"Democracy flourishes best when ideas compete with one another. Totalitarian states deny the right of competition of ideas. It's the suppression and not the circulation of ideas that we must fear in America. Therefore, on freedom of speech we shall not yield a fraction of an inch. We shall not abandon this basic American principle. We shall fight for this freedom, defend this freedom with all our strength.

"The industry has been charged with putting subversive, un-American propaganda on the screen. There has not been one shred of evidence to support the accusation. There never will be, for the motion picture producers whom I represent hate and loathe Communism. The pictures are the best evidence. They speak for themselves."

* * * *

Q. (By Mr. Katz): This is a copy of statements of Mr. [408] McNutt, is it, that you read and which were called to your attention on or about October 23, 1947, before you testified?

A. Yes, sir.

Mr. Katz: That is Plaintiff's Exhibit No. 9.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit No. 9 in evidence. [409]

* * * *

(Testimony of Lester Cole.)

PLAINTIFF'S EXHIBIT No. 9

From a News Story in the New York Times
October 23, 1947, Page 15

McNutt declared himself "shocked to see the violence done to the principle of free speech during the hearing this morning."

"How would your editors like to be told what should be put in the editorial page?" he exclaimed to the crowd of reporters encircling him. In his statement repeating his extemporaneous remarks, Mr. McNutt declared:

"It became perfectly apparent during the chairman's questioning of Mr. McGuinness that the purpose was to try to dictate and control through the device of the hearings what goes on the screens of America.

"This is no concern of any Congressional Committee. It is the concern solely of those who produce motion pictures.

"You don't need a law to impair the constitutional rights of free speech. It can be done by intimidation and coercion. That is the way of totalitarian regimes which we all hate.

"We shall fight to continue a free screen in America. We fought for it when freedom of speech was challenged before the Senate committee in 1941. The industry asserted then its right to choose the material to be used on the screen. It emphatically reasserts that right today, and accepts the full responsibility for screen content."

* * * *

(Testimony of Lester Cole.)

Q. (By the Court): Mr. Cole, I show you a statement, which I am not going to characterize as anything except that it purports to contain some language of Mr. McNutt, and I will ask you if you saw in the press a statement, in substance, as the one I have just handed to you, attributed to the same person.

A. Yes; I did.

The Court: All right. Now you take over from there, Mr. Katz.

Mr. Katz: May I have this marked in evidence, please?

The Court: All right.

* * * *

[411]

[Plaintiff's Exhibit 10 was read to the jury.]

EXHIBIT No. 10

From a News Story in the New York Times
October 25, 1947

Mr. McNutt, . . . issued this statement:

"We have been saying all along that one of the basic issues in this investigation is free speech.

"The dangers to free speech inherent in this inquiry were sharply pointed up in the attacks on the press at the hearings this morning.

"We have said that when the free screen was singled out first for attacks on its rights of freedom of expression, then the press, the radio and other instruments of communication would not be immune.

"The press was challenged today. Will it be radio programs tomorrow? Books and magazines, the next day? Where will it end?

(Testimony of Lester Cole.)

“These are very real threats to the freedom guaranteed by the Bill of Rights to the American people.”

Q. (By Mr. Katz): There were other statements of Mr. McNutt, that appeared in the press, attributed to him, that came to your attention before you testified on October 30, 1947?

Mr. Walker: That is objected to as immaterial.

The Court: I will allow it to be answered just yes or no but not beyond that; not as to the contents.

Mr. Katz: I didn't intend for him to answer it in that way. But at the appropriate time, we will offer just those quotes.

The Court: Yes. [415]

Q. (By Mr. Katz): Will you answer that question? A. Yes.

* * * *

Q. (By Mr. Katz): On the evening of Sunday, October 26, 1947, did you hear a nationwide broadcast, from Hollywood, from the Committee on the First Amendment? A. Yes; I did.

Q. On that broadcast did certain persons, known to you to be employees of Loew's, Incorporated, appear? A. Yes; they did.

Q. And they made statements over the air concerning this hearing? A. Yes, sir.

Mr. Katz: Judge Yankwich, we have transcripts of the radio broadcast. Perhaps the better way to handle it would be to play it to you first so that you may determine whether you believe it should go to the jury or not.

The Court: I can save you the trouble. It is not going [416] to the jury. I don't think it is material.

(Testimony of Lester Cole.)

Unless there were also representatives of the company who heard it, it is not material at all because the mere fact that other employees took an attitude does not bind the defendant nor warrant him in assuming that they may not choose to sanction the conduct he proposed to indulge in when he got to Washington. [417]

Mr. Katz: We will not argue this point with the court because I know it remains open. We think there are theories for its admissibility, but in the interests of time, we will step to another matter, and present that more fully to the court subsequently, if we may be permitted to argue it at a future time, which I know you will let us do, outside of the presence of the jury.

The Court: I will hear you outside of the presence of the jury.

Mr. Katz: All right.

The Court: But I cannot see any theory upon which what other employees did before he took action can be material to this phase of the case. It may be, on the equitable side of the case or on my side of the case.

It might be material as to the scope of any judgment or declaration, but not as to the question which the jury must determine, which is simply this: whether this conduct had the effect in the prohibitory clause—

Mr. Katz: We think it goes to that point.

The Court: No, it does not. Regardless, I don't want to hear it. Incidentally, I am not going to take the time to hear it, but I may say now that I heard

(Testimony of Lester Cole.)

that broadcast. It happened to be one of the few matters that I heard. I know its contents. I followed the theories of the women, the persons who came there and the persons who had portions of the [418] Bill of Rights and the like, so far as my memory goes—

Mr. Katz: Your memory is very good.

The Court: Thanks for the compliment, but I cannot see that anything like that can have any bearing on your case, and I will let you put it in the record more fully, but I want to tell you that I don't want to keep the jury out too long while this matter is being argued. We will have a short recess, anyway. If you want to argue it at any time before I call in the jury, we will do it. If not, we will postpone it until some other time, but I can dispose of it very quickly without listening to the broadcast. The broadcast took half an hour, if I remember rightly, and I am not going to listen to it, regardless, because I know its contents, unless you show me that Dore Schary or some other men connected with the studios, with the industry, and more particularly somebody connected with this defendant, had something to do with it, so that this plaintiff had the right to rely upon the assumption that they sanctioned the action he was about to take. I think they are not concerned with it at all.

Mr. Katz: We think we can show you that, but we will argue it with you during the recess.

The Court: We will take a short recess and the court admonishes the jury. Well, the usual admonition has been given. We will take a recess.

* * * *

[419]

(Testimony of Lester Cole.)

Q. (By Mr. Katz): Mr. Cole, before you testified before Mr. Thomas, Mr. Vail and Mr. McDowell on October 30, 1947, did you hear the testimony given by Mr. Eric Johnston, president of the Producers' Association at that hearing? I particularly call your attention, in the interest of time—I have laid before you a transcript of the hearing and will you turn to transcript page 313; I have discussed this with counsel, Judge Yankwich, so that it may be clear, this part deals with the matter that was gone into in the deposition of Mr. Mannix with reference to the three-point program of the producers; the first point, insistence upon a fair and objective investigation by Thomas' Un-American Committee; the second point, the request of Mr. Johnston that persons be discharged because of their asserted political belief; third, that Mr. Byrnes be appointed attorney; and the reason I am doing this is because Mr. Johnston says the second, which is the point about employment, was turned down, so that it may be clear to the court and to the jury.

I call your attention to page 313 and ask you to read the matter that you heard stated by Mr. Johnston before you testified and which is set out at page 313, starting at the place that I have indicated and shown to counsel for the producers. [420]

A. Yes, I was present at the hearings and heard this.

Q. And is that what Mr. Johnston said?

A. Yes, it is.

* * * *

(Testimony of Lester Cole.)

Mr. Katz: This, as I said, is the extract of the testimony of Mr. Eric Johnston on October 27, 1947, and it is a colloquy, questions and answers of him, by Mr. Stripling, the [421] investigator for the committee, and has reference to the so-called three-point program, the first point dealing with the insistence of the producers for—

Mr. Selvin: Just a moment, please. Mr. Katz is going to read it.

The Court: To read it, and don't comment on it, please. Just tell them—they will understand what it is. If they do not, we will explain it to them, what he is talking about.

Mr. Katz: "Mr. Chairman," this is Mr. Johnston speaking, not I—

"Mr. Johnston: 'Mr. Chairman, the Association of Motion Picture Producers at Los Angeles adopted the first and third. They did not adopt the second. The second is the agreement not to employ proven Communists in Hollywood on jobs where they would be in a position to influence the screen. They did not adopt that for several, what they thought, were very good reasons.

"Mr. Stripling: Would you pardon me just a moment?

"Mr. Johnston: May I complete?

"Mr. Stripling: Complete your statement?

"Mr. Johnston: Yes.

"Mr. Stripling: Yes, certainly.

"Mr. Johnston: The first reason assigned was that for us to join together to refuse to hire someone

(Testimony of Lester Cole.)

or some people would be a potential conspiracy, and our legal counsel advised [422] against it.

“Second, who was going to prove whether a man was a Communist or not? Was it going to be by due process of law in the traditional American manner, or was it to be arrogated to some committee in Hollywood to say he was a Communist, or some producer, and if they said he was a Communist they might at some future time find he was a Republican, a Democrat, or a Socialist, and not hire him.

“In other words, who is going to prove that this man was a Communist? And under what methods?

“Third, that it was the duty of Congress to determine two things: First, was a Communist an agent of a foreign government—as I believe he is and/or second, is he attempting to overthrow our Government by unconstitutional means. Therefore, it was up to Congress to make these two determinations before we could take action.

“I must confess”—

This is Mr. Johnston:

“I must confess they convinced me they were right on all three points, Mr. Chairman, and that is the reason they did not attempt No. 2.”

I believe that should be “adopt No. 2”.

“Mr. Stripling: Did you urge the adoption of No. 2?

“Mr. Johnston: I did; I urged the adoption of No. 2 but the questioning from our legal counsel present, and from the [423] membership present, convinced me I was wrong.”

You heard that testimony of Mr. Johnston?

(Testimony of Lester Cole.)

A. Yes, I did.

Q. Then, on October 30, 1947, did you appear pursuant to that subpoena in the hearing room?

A. Yes, I did.

Q. Would you describe that hearing room, when you appeared as a witness on October 30, 1947?

A. Well, it was a large room, more than twice the size of this courtroom. There were over 90 news reporters there from all over the country and from the foreign press. The whole room was equipped with batteries of electric lights for the accommodation of cameras and all the sound equipment for the radio. There were microphones on the witness stand and on the stand before the committee or the subcommittee, which was present, and the flashlight bulbs, of course, were popping all over in the face of the witness, myself, as I took the stand.

Q. Were flashlights popping in your eyes?

A. Yes, sir.

Q. And before you took the stand, had you observed whether other witnesses who preceded you had handed up prepared statements which they sought to read? A. Yes, I did.

Q. Who were some of the witnesses who preceded you who [424] had prepared written statements which they handed up to the committee to read?

A. Well, there was Mr. Mayer, there was Mr. Warner, there was Mr. McNutt and there was Mr. Johnston.

Q. They had asked permission to read statements and were allowed to read their statements, is that right? A. That is right, yes.

(Testimony of Lester Cole.)

Q. Had you, with you, a written statement which you sought to read? A. Yes, I did.

Q. Did you ask permission to read that statement? A. Yes, sir.

Q. Were you granted permission to read the statement? A. No, I was not.

Mr. Katz: I show you here, counsel, an exact copy of the statement which Mr. Cole requested to read and ask that you identify it. I just ask you to examine it.

Mr. Selvin: Well, I will accept your statement that it is a correct copy.

Mr. Katz: May it just be marked for identification?

The Court: At this time it may be marked for identification.

The Clerk: Plaintiff's Exhibit 13 marked for identification.

Q. (By Mr. Katz): In the transcription of your statements [425] before the House Committee and your actions before that House Committee, reference is made to a statement which you handed up to the chairman of the committee which you asked permission to read. Is this it? Just look at it and tell us whether that is the statement which you sought to read at that time. A. Yes, it is.

Mr. Katz: Or a copy of the statement.

Now we offer that statement into evidence as plaintiff's exhibit next in order.

The Court: All right, it may be received. [426]

The Clerk: That is Plaintiff's Exhibit 13 in evidence.

(Testimony of Lester Cole.)

Q. (By Mr. Katz): That is the statement you desired to read to the committee, is that correct?

A. Yes, sir, it is.

Mr. Katz: Now, would your Honor like to read that?

The Court: I will read it.

Mr. Katz: Thank you very much. May I sit down while you are reading it?

The Court: Yes, you may sit down.

* * * *

[427]

[Plaintiff's Exhibit 13 was read to the jury by the court.]

EXHIBIT No. 13

STATEMENT BY LESTER COLE

Submitted to House Un-American Activities Committee October 30, 1947.

I want to say at the outset that I am a loyal American, who upholds the Constitution of my country, who does not advocate force and violence, and who is not an agent of a foreign power.

This Committee has announced many times its interest in facts pertinent to this inquiry. I believe many such facts are embodied in this statement.

I have been a working screen-writer in the Motion Picture Industry since 1932. To date, I have written thirty-six screen plays, the titles of which and companies which produced them are attached.

I was working in Hollywood in 1933 when screen writers, faced with an arbitrary fifty per cent cut in salaries, formed the Screen Writers' Guild for the purpose of collective bargaining.

(Testimony of Lester Cole.)

From the very start there were attempts to create strife within the industry by groups who used the same technique employed by this committee.

After years of failure by James Kevin McGuinness, Rupert Hughes and other of your friendly witnesses to disrupt the Screen Writers' Guild, and with it the industry, a desperate appeal was made to Martin Dies, former Chairman of this Committee. Or maybe Martin Dies made the appeal; at any rate the investigations began.

When the Dies investigation proved unsuccessful because of the united resistance of the men and women of the industry, a new tactic was employed. Willie Bioff and George S. Browne were called into the fray.

These two men, Browne and Bioff who ran the IATSE, the union which was represented here the other day by Mr. Roy Brewer, took on the job of creating chaos in the industry. They bought full page advertisements in the Hollywood trade papers, the "Reporter" and the "Daily Variety", announcing their intentions of taking over all independent Hollywood Guilds and Unions, but only, of course, for one purpose; the eradication of Communism. You will recall that Al Capone, just before going to jail, called upon the American people to "eradicate" all subversive un-American influences in American life, including Communism. By a strange coincidence, the warning of Browne and Bioff also was issued but a short time before they too went to jail for the extortion of huge sums of money; a shakedown of the motion picture industry.

(Testimony of Lester Cole.)

For fifteen years these men have engaged in slander, malicious gossip, near libel; in fact, in every method known to man but one—traditional American democratic procedure.

As in years gone by they accommodated Martin Dies, and later extortionists Browne and Bioff, today McGuinness, Incorporated, is playing footsies with the House Committee on Un-American Activities. They think the Committee is stooging for the Motion Picture Alliance; the reverse is true.

From what I have seen and heard at this hearing, the House Committee on Un-American Activities is out to accomplish one thing, and one thing only, as far as the American Motion Picture Industry is concerned; they are going either to rule it, or ruin it.

This Committee is determined to sow fear of black-lists; to intimidate management, to destroy democratic guilds and unions by interference in their internal affairs, and through their destruction bring chaos and strife to an industry which seeks only democratic methods with which to solve its own problems. This Committee is waging a cold war on democracy.

I know the people in the motion picture industry will not let them get away with it.

1932: *If I Had a Million*, Paramount.

1933: *Charlie Chan's Greatest Case*, 20th Century Fox.

1934: *Pursued*, 20th Century Fox; *Wild Gold*, 20th Century Fox; *Sleepers East*, 20th Century Fox.

1935: *Under Pressure*, 20th Century Fox; *Hitch Hike Lady*, Republic; *Too Tough to Kill*, Columbia.

(Testimony of Lester Cole.)

1936: *The President's Mystery*, Republic; *Follow Your Heart*, Republic.

1937: *Affairs of Cappy Ricks*, Republic; *The Man in Blue*, Universal; *Some Blondes Are Dangerous*, Universal.

1938: *The Jury's Secret*, Universal; *The Crime of Dr. Hallet*, Universal; *Midnight Intruder*, Universal; *Sinners in Paradise*, Universal; *Secrets of a Nurse*, Universal.

1939: *Winter Carnival*, Wanger-United Artists; *The Invisible Man Returns*, Universal; *The Big Guy*, Universal; *I Stole a Million*, Universal.

1940: *Footsteps in the Dark*, Warner Bros.; *The House of Seven Gables*, Universal.

1941: *Pacific Blackout*, Paramount; *Among the Living*, Paramount.

1942: *Night Plane From Chungking*, Paramount.

1943: *Hostages*, Paramount; *None Shall Escape*, Columbia.

1944: *Objective Burma*, Warner Bros.; *Blood on the Sun*, Cagney-United Artists.

1945: *Men In Her Diary*, Universal.

1946: *Strange Conquest*, Universal; *Romance of Rosy Ridge*, Metro-Goldwyn-Mayer; *Fiesta*, Metro-Goldwyn-Mayer.

1947: *The High Wall*, Metro-Goldwyn-Mayer.

Mr. Walker: May I request your Honor to instruct the jury that none of the statements in the statement made by or prepared by Mr. Cole are to be taken as statements of proving any facts.

The Court: That is right. They are merely given as composing a statement he handed to the Com-

(Testimony of Lester Cole.)

mittee and was not allowed to read and you are not concerned with the truth or untruth of any of the statements in the statement, whether they relate to the policy of the Committee or to the policy of other persons in the industry.

Q. (By Mr. Katz): Now, when you took the stand there, Mr. Cole, did you notice whether the chairman had a gavel in his hand?

A. Yes, sir, he did.

Mr. Katz: And we now have, Judge Yankwich, the exact recording of what Mr. Cole said or did, as said in the questions and in the answers.

The Court: All right.

Mr. Katz: And this is probably an appropriate time to give it.

The Court: Now, in order to do it, first you will have to identify the record as an exhibit.

Mr. Katz: Yes. All right. May I go in here?

The Court: Yes.

(A short intermission follows.)

Mr. Selvin: You are exhibiting to me what appears to be a phonographic record. I will accept your implied statement that it is a correct transcript of Mr. Cole's testimony before the Un-American Activities Committee.

Mr. Katz: We finally reached an agreement.

Mr. Selvin: I have not heard that particular record. I am sure it is correct.

Mr. Katz: I have had counsel stipulate that that is the record which transcribes the questions and responses of Mr. Cole.

(Testimony of Lester Cole.)

The Court: All right.

Mr. Katz: On October 30, 1947. And I ask that this be marked as our exhibit next in order.

* * * *

The Clerk: Plaintiff's Exhibit 14, marked for identification.

[Plaintiff's Exhibit 14 consists of a phonographic reproduction of Lester Cole's testimony before House Committee on Un-American Activities.]

Mr. Katz: I think before playing it, I can identify some of the voices. Some of the voices heard are that of [431] Stripling, one of the gentlemen who asks some questions. The other voice is that of J. Parnell Thomas who presided. The knock, knock, knock is the gavel of Mr. Thomas and you also hear the voice of Mr. Lester Cole.

The Court: All right.

Mr. Katz: Will you hook it up? All right.

The Court: All right. Gentlemen, now what you are going to play here is a recording of the things spoken and sounds uttered at the time.

* * * *

(Whereupon said phonographic record was played, reproducing testimony of Lester Cole, the plaintiff herein, substantially as follows:)

"Mr. Stripling: Mr. Cole, will you please state your full name and present address?

"Mr. Cole: Lester Cole, 15 Courtney Avenue, Hollywood, Calif. [432]

(Testimony of Lester Cole.)

“Mr. Stripling: When and where were you born, Mr. Cole?

“Mr. Cole: I was born June 19, 1904, in New York City.

“Mr. Stripling: What is your occupation?

“Mr. Cole: I am a writer.

“Mr. Stripling: How long have you been a writer?

“Mr. Cole: For approximately 15, 16 years.

“Mr. Stripling: How long have you been in Hollywood?

“Mr. Cole: Since—I first came to Hollywood in 1926; I left and went back to New York in 1929; returned in 1932, and have been there ever since.

“Mr. Stripling: Are you a member of the Screen Writers Guild?

“Mr. Cole: Mr. Chairman, I would like at this time to make a statement.”

Mr. Katz: This pause is while they were reading the statement.

The Court: I see in the reproduction that you are very careful of what you say.

“Mr. McDowell: I think it is insulting, myself.

“The Chairman: This statement is clearly another case of villification and not pertinent at all to the inquiry. Therefore, you will not read the statement.

“Mr. Cole: Well, Mr. Chairman——

“The Chairman: Mr. Stripling, ask the first question. [433]

“Mr. Cole: Mr. Chairman, may I just ask if I do not read my statement——

(Testimony of Lester Cole.)

“The Chairman: You will not ask anything.

“Mr. Cole: Is the New York Times editorial pertinent—the editorial in the Herald Tribune pertinent?

“The Chairman: Go ahead and ask the question.

“Mr. Stripling: Mr. Cole, are you a member of the Screen Writers Guild?

“Mr. Cole: I would like to answer that question and would be very happy to. I believe the reason the question is asked is to help enlighten——

“The Chairman: No, no, no, no, no.

“Mr. Cole: I hear you, Mr. Chairman, I hear you, I am sorry, but——

“The Chairman: You will hear some more.

“Mr. Cole: I am trying to make these statements pertinent.

“The Chairman: Answer the question, ‘Yes’ or ‘no.’

“Mr. Cole: I am sorry, sir, but I have to answer the question in my own way.

“The Chairman: It is a very simple question.

“Mr. Cole: What I have to say is a very simple answer.

“The Chairman: Yes; but answer it ‘yes’ or ‘no.’

“Mr. Cole: It isn’t necessarily that simple.

“The Chairman: If you answer it ‘yes’ or ‘no,’ then [434] you can make some explanation.

“Mr. Cole: Well, Mr. Chairman, I really must answer it in my own way.

“The Chairman: You decline to answer the question?

(Testimony of Lester Cole.)

“Mr. Cole: Not at all, not at all.

“The Chairman: Did you ask the witness if he was here under subpoena?

“Mr. Cole: What is it, Mr. Chairman? I beg your pardon?

“Mr. Stripling: Mr. Cole, you are here under subpoena served upon you on September 19, are you not?

“Mr. Cole: Yes; I am.

“Mr. Stripling: And the question before you is: Are you a member of the Screen Writers Guild?

“Mr. Cole: I understand the question, and I think I know how I can answer it to the satisfaction of the committee. I wish I would be permitted to do so.

“The Chairman: Can't you answer the question?

“Mr. Cole: You wouldn't permit me to read my statement and the question is answered in my statement.

“The Chairman: Are you able to answer the question ‘yes’ or ‘no,’ or are you unable to answer it ‘yes’ or ‘no’?

“Mr. Cole: I am not able to answer ‘yes’ or ‘no.’ I am able, and I would like to answer it in my own way. Haven't I the right accorded to me, as it was to Mr. McGuinness and [435] other people who came here?

“The Chairman: First, we want you to answer ‘yes’ or ‘no,’ then you can make some explanation of your answer.

“Mr. Cole: I understand what you want, sir. I wish you would understand that I feel I must make

(Testimony of Lester Cole.)

an answer in my own way, because what I have to say——

“The Chairman: Then you decline to answer the question?

“Mr. Cole: No; I do not decline to answer the question. On the contrary, I would like very much to answer it; just give me a chance.

“The Chairman: Supposing we gave you a chance to make an explanation, how long would it take you to make that explanation?

“Mr. Cole: Oh, I would say anywhere from a minute to 20, I don't know.

“The Chairman: Twenty?

“Mr. Cole: Sure. I don't know.

“The Chairman: And would it all have to do with the question?

“Mr. Cole: It certainly would.

“The Chairman: Then would you finally answer it ‘yes’ or ‘no’?

“Mr. Cole: Well, I really don't think that is the question before us now, is it?

“The Chairman: Then go to the next question.

“Mr. Stripling: Mr. Cole, are you now or have you ever been a member of the Communist Party?

“Mr. Cole: I would like to answer that question as well; I would be very happy to. I believe the reason the question is being asked is that because at the present time there is an election in the Screen Writers Guild in Hollywood that for 15 years Mr. McGuinness and other——

“The Chairman: I didn't even know there was an

(Testimony of Lester Cole.)

election out there. Go ahead and answer the question. Are you a member of the Communist Party?

“Mr. Cole: If you don’t know there is an election there you didn’t hear Mr. Lavery’s testimony yesterday.

“The Chairman: There were some parts I didn’t hear.

“Mr. Cole: I am sorry, but I would like to put it into the record that there is an election there.

“The Chairman: All right, there is an election there. Now, answer the question. Are you a member of the Communist Party?

“Mr. Cole: Can I answer that in my own way, please? May I, please? Can I have that right? Mr. McGuinness was allowed to answer in his own way.

“The Chairman: You are an American, aren’t you?

“Mr. Cole: Yes; I certainly am, and it states so in my statement.

“The Chairman: Then you ought to be very proud to answer [437] the question.

“Mr. Cole: I am very proud to answer the question, and I will at times when I feel it is proper.

“The Chairman: It would be very simple to answer.

“Mr. Cole: It is very simple to answer the question——

“The Chairman: You bet.

“Mr. Cole (continuing): And at times when I feel it is proper I will, but I wish to stand on my rights of association——

(Testimony of Lester Cole.)

“The Chairman: We will determine whether it is proper.

“Mr. Cole: No, sir. I feel I must determine it as well.

“The Chairman: We will determine whether it is proper. You are excused.

“Next witness, Mr. Stripling.”

“The Chairman: The Chair would like to caution people in the audience that you are the guests of the committee.”

Mr. Katz: I am satisfied that that ended Mr. Cole's.

The Court: All right.

Let me ask the members of the jury if you heard distinctly every word? Sometimes, the ear not being accustomed to the artificial sound, may not catch every word. I didn't take long. I will have it run over again, if you wish. Would any member of the jury like to have it run over?

A Juror: Yes, I would.

The Court: You would. All right, let us run it over [438] again. I am asking this because I have had experience with these in the courtroom here and you had to get yourself tuned to it, just like listening to a certain speech, if you hear English spoken by an Englishman you will listen attentively, and you think you are listening to some different language. All right.

* * * *

(Whereupon said recording of the said testimony

(Testimony of Lester Cole.)

of Lester Cole, plaintiff herein, was again played before the court and jury.) [439]

* * * *

Friday, December 10, 1948, 2:00 p.m.

Mr. Katz: Now, we offer into evidence as Plaintiff's exhibit next in order the record which was heretofore merely marked for identification.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 14 in evidence.

* * * *

[450]

Mr. Katz: Attached to the exhibit which was read to the jury, which is the statement of Lester Cole,—in that exhibit Mr. Cole said, “To date, I have written 36 screen plays, the titles of which and companies which produced them are attached.” The list which is not attached to that exhibit I have shown copies of to counsel. And may it be attached to the exhibit and received?

The Court: All right; it may be received.

Q. (By Mr. Katz): On the same day that you testified, on October 30, 1947, were the hearings before this Committee called off and terminated?

A. Yes; they were.

Q. Before you testified on October 30th and on the same day when the Producers' ad appeared which is Exhibit No. 6, the one called “The Citizen Before Congress,” which comments on the right to cross-examine, among other things, do you know whether your attorneys, on your behalf, filed an application before that Committee to give you the right to cross-examine some of the people who had testified at that hearing against you?

(Testimony of Lester Cole.)

A. Yes; I do.

Q. And you saw that application and know that it was [451] filed the same day the Producers' ad appeared?

A. Yes; that is right.

Mr. Katz: We offer into evidence, again understanding the limitation that has been applied, merely to show what happened in the conduct before the Committee—I will withdraw my statement and ask one question.

Q. Was the right to cross-examine witnesses given, as requested by your counsel?

A. No; it was not. [452]

* * * *

Q. (By Mr. Katz): Did you, following your appearance on October 30th,—you have said that was the date that the hearing ended—return back to California and your work?

A. I went to New York and returned from New York. My train reservations were made that way.

Q. Who had made your train reservations going to Washington and return?

A. I believe that I made my reservations going to New York but that—I think it is so—I am sure coming back they were made for me by the offices of Loew's Incorporated, their transportation department.

Q. En route to California and on the train returning to your work in Hollywood, did you have a conversation with Mr. Louis B. Mayer?

A. Yes; I did. [453]

(Testimony of Lester Cole.)

Q. Please state what was said, en route to California on the train, by you and by Mr. Mayer?

A. We met in his drawing room at the request of Mr. Strickling, who was traveling with him and was his, I believe, personal publicity man. I came into Mr. Mayer's drawing room and he was visibly agitated——

Mr. Selvin: Just a moment, please——

The Court: Let's not describe that unless he did something that may warrant your drawing the inference. State what he said.

Q. (By Mr. Katz): If he did anything, describe it.

A. He greeted me in a way which showed his agitation——

Mr. Selvin: I move that statement be stricken out, if your Honor please,——

The Court: That may be stricken. Just state what he said. You have done very well so far. Now, let's get down to the narrative and not comments.

Suppose you write a script, without instructions how to have it expressed.

A. Very good, your Honor. He said that he was terribly upset by the method with which the Committee had treated him and myself and Mr. Trumbo, who was another employee and writer of the concern. He commented on the fact that he had been brushed aside rudely before he had concluded his testimony and permitted to stand right there, without being [454] excused, and that a woman was brought on, presumably an expert on film matters, and that, while he

(Testimony of Lester Cole.)

was standing there, she testified to the effect that a picture he had made, *The Song of Russia*, had been designated Communist propaganda because, among other things, it showed children smiling. He felt that the whole thing was a disgrace and he wished it had never happened. He then went on at some length into the story of his life, quite autobiographical again. I listened. He spoke of it in a rather agitated way.

Q. (By Mr. Katz): Tell us as best you can what he said.

A. I beg your pardon. I am awfully sorry. I will repeat. He told me once again the story of his humble beginnings and his rise to success, and from that he went into the fact that he believed that all of this trouble was caused by the formation of the Screen Writers Guild many years ago; that this had started the conflict in Hollywood. And he wished, he said, that the organization had never come into being. I told him that I held a different view on the matter, and that, as in the past, he had respected my point of view and I respected his, although we differed, and that I believed that the organization had a proper place in the industry. And I told him that I didn't see any reason for his great concern because, on the day the hearings had closed, Mr. McNutt, the special counsel for the motion picture industry, had said or had been reported to say in the newspapers that the abrupt termination [455] of these hearings, which came on the day which I had testified, constituted a triumph for our industry, and I felt that this was so,

(Testimony of Lester Cole.)

too, and that I felt that there was no need for any concern.

Q. Will you go on with the conversation?

A. He then said to me that this matter, he felt, did place him in a position where it would be rather difficult for him to go through with the plans that he had in regard to making me an executive. He then spoke on personal matters again and, without any further reference to the hearing that I can recall, the conversation ended.

Q. What, if anything, did he say about your conduct and your testimony there?

A. I don't recall that he said anything directly in regard to my conduct. He did say something to the effect that he wished these hearings had never taken place but I recall no conversation in regard to my conduct before the Committee.

The Court: Was the question of your conduct discussed at all, either one way or another, or was it merely an occasion for discussing generalities?

A. I recall no particular mention of my conduct then.

The Court: All right. Go ahead.

Q. (By Mr. Katz): Then did you return to work at the [456] studio? A. Yes; I did.

Q. What work did you return to do?

A. I returned on the assignment which I had been working on prior to my departure for Washington and for a period of the time that I was there, Zapata.

Q. And you continued to work every day on Zapata, did you? A. Yes; I did.

(Testimony of Lester Cole.)

Q. And that was in connection with the preparation for the screen of Zapata?

A. That is correct.

Q. Who was your producer that you worked for after you returned from Washington?

A. Mr. Jack Cummings.

Q. Did you work every day during the month of November, 1947, following your return?

A. Yes; I did.

Q. On December 3, 1947, or, rather, December 2, 1947, did you have a conversation with one Edward J. Mannix?

A. Yes; I did.

Q. Will you state what that conversation was?

A. Mr. Mannix called me on the telephone and he said, "Lester, I want you to know there is nothing personal in what I am going to do now but I am sending you by registered mail [457] a notice of your suspension." He repeated, "You know that this has nothing to do with me. It is not personal. But I am told to do it and I am doing it."

And I replied that he might not feel it was personal but, if he could convince my kids that it wasn't personal, that would be better; that I couldn't feel it that way; that he had promised me months before that he didn't give a damn what my alleged political associations were as long as I performed my work ably, and that I considered, in sending me this suspension, it was a personal betrayal..

That was the end of that conversation. [458]

Q. Have you been ready to work for Loew's since that date?

A. Yes, sir; I have.

(Testimony of Lester Cole.)

Q. You know, do you not, that no—withdraw that. Since that time, have you received any compensation from Loew's? A. No; I haven't.

Q. You know, do you not, that under this notice of suspension you can't work at Loew's and you can't work for any other studio, and whatever you write on your own time still belongs to Loew's?

A. Yes.

Mr. Selvin: Just a minute. I object to that upon the ground it calls for a legal conclusion of the witness.

Mr. Walker: And we ask that the answer be stricken and the objection stand before the answer.

Mr. Katz: Is there any question but what that is the fact? Will you stipulate that is the fact?

Mr. Selvin: No. There is a great deal of argument about that very question, Mr. Katz.

The Court: I think the witness should be allowed to state not that they had a right but whether he understood from the wording of the agreement and the fact that they reserved all of their rights under it that he couldn't write for anyone else because, otherwise, it might be argued that he just [459] sat around, without trying to obtain employment otherwise. As said in the Goudal case, it is the duty of an employee when discharged or suspended, even if he claims it was wrongful, to seek to regain employment. And, while I think in this particular case the problem is one of law, because the jury are not called upon to determine any money judgment in case their answers show there has been a violation, nevertheless, I

(Testimony of Lester Cole.)

do think the understanding that he had as to his rights under the contract and the notice should be stated to the jury.

Mr. Selvin: I will state to your Honor and for the record that there is not and will not be any contention in this case on the part of the defendant that there has been any failure to mitigate upon the part of Mr. Cole. And with that it seems to me that Mr. Cole's understanding, right or wrong, of the terms of his contract is immaterial to the issues which are to be submitted to the jury.

Mr. Katz: It is certainly material.

The Court: Let me ask you a question. Are you contending that under the contract he was free to be employed, to go and secure other employment and work on his own and produce writings? Are you contending that your notice gave him that right?

Mr. Selvin: We have taken the position, as indicated in the briefs, that that is a legal conclusion.

The Court: Are you taking that attitude and did you inform him of that fact?

Mr. Selvin: Your Honor is asking two questions.

The Court: Then, I will ask them seriatim.

Mr. Selvin: Not until some proceedings in this court, with which your Honor is familiar, was anything in regard to that, from me, given to Mr. Cole.

The Court: Let's not be mysterious.

Mr. Selvin: I am not being mysterious, your Honor, but I should prefer not to enter into a discussion of the legal phases in the presence of the jury, if I can avoid it.

(Testimony of Lester Cole.)

The Court: I prefer that, too, but I want the position of the company to appear clearly before the jury for the purpose of a determination of the questions to come before them, and I think that question should be answered.

Mr. Selvin: I will answer that question. In my opinion, as a lawyer, if Mr. Cole, on or at any time after December 2nd, had acted upon the assumption or belief that he was free to work elsewhere, and that his work was his to dispose of as he saw fit, he would have had the right to do so.

Mr. Katz: That isn't a statement at all in answer to the court's question. That is some gobbledy-gobble.

Mr. Selvin: No, that is why I said I wouldn't like to argue the matter before the jury.

The Court: Just a moment. Did you ever, before a month [461] or so ago, when a hearing was had, intimate to him his right, that he had such right?

Mr. Selvin: No; we didn't.

The Court: All right. Thank you very much for your forthrightness. That ends the controversy. No more questions are necessary.

Mr. Katz: You may cross-examine.

Cross-Examination

By Mr. Walker:

Q. Mr. Cole, I think you said that you had been a writer, connected with the motion picture industry, since 1932. Is that correct?

A. Yes, sir; I believe it is.

Q. I think you also said that at some time prior to your engagement as a writer with the motion pic-

(Testimony of Lester Cole.)

ture industry you had been connected with certain theatrical enterprises, is that correct?

A. Yes, sir.

Q. In 1928, you had been a stage manager for Sidney Grauman, is that so?

A. I believe it was 1928 or 1927; around that time.

Q. 1927 or 1928?

A. Around that time; yes, sir.

Q. And prior to that time you had been a stage manager for some other concerns or companies, had you not? [462]

A. That is correct; yes, sir.

Q. I will ask you to repeat the names of the companies that you were connected with in that capacity.

A. I was connected with—I don't know whether you would call it a company but a producer by the name of Morris Gest, who produced *The Miracle*, and I was connected with a group called the New York Theatrical Assembly, which was run by a man named Walter Greenough. I had worked briefly for the Shuberts in New York. I believe that is about all I can remember at the moment.

Q. Was it prior to that time—or let me ask you, first, this was in connection with producing stage plays, was it not? A. Yes, sir.

Q. And prior to that time or during that period, were you also engaged in the acting profession?

A. To a very limited extent, Mr. Walker. A stage manager is a man who is frequently called on by the company to fill in in small parts, which doesn't interfere with his main work, which is the running of the

(Testimony of Lester Cole.)

stage itself. So that at such times I had appeared briefly in small parts to help fill in for the company, as is the custom in the theater.

Q. The Ellis Baker Stock Company was not a company with which you were connected as a stage manager, was it?

A. I served for them in both capacities. It was a [463] small company. To the best of my recollection, I acted for them in that company and I believe that I also helped run the stage.

Q. What period was that?

A. That was later. I believe that was in 1928 or 1929.

Q. And for what period of time?

A. Oh, for a few months in the fall of whatever year it was.

Q. And, primarily, your duties with that company were as an actor?

A. I believe that is so but I believe that I served in both capacities.

Q. Then, did you not act in a company, at the head of which or connected with which was a well-known actor known as Edward Everett Horton?

A. That is true.

Q. That was something other than the Ellis Baker Stock Company? A. Yes; it was.

Q. When were you an actor with a company with which Edward Everett Horton was connected?

A. I believe it was during that same period, between 1927 and 1930.

(Testimony of Lester Cole.)

Q. And were you stage manager for that company? [464]

A. I really don't recall. I believe that I did help in running the stage but I know I also played small parts for Mr. Horton. That was the kind of stock or repertoire company which he had at that time.

Q. That means a company which puts on a great many different plays for a relatively small period of time; in other words, the plays did not run for any great length of time, is that right?

A. I would say, to the best of my recollection, that Mr. Horton would put on a play and have it run for as long a period of time as it proved profitable, preparing another play to replace it at such time as it didn't.

Q. You played a number of different parts which you would describe as minor parts?

A. I wouldn't say a number. I played some.

Q. I think you also said that at one time you acted as an extra in connection with the motion pictures?

A. That is correct; yes, sir.

Q. You have not been an actor with the moving picture industry except in that capacity?

A. That is right.

Q. And you haven't devoted yourself professionally to acting——A. No, sir.

Q. ——since you became a writer, in 1932? [465]

A. That is correct.

Q. You, I think, said you had published a play or, rather, that a play of yours had been produced, is that correct? A. Yes; it is.

(Testimony of Lester Cole.)

Q. And that, in 1932, there was another play of yours that was receiving consideration for production? A. That is correct.

Q. And it was about that time that you first came out and were employed definitely and continuously, or more or less continuously, as a writer for the moving picture industry? A. Yes, sir. [466]

Q. (By Mr. Walker): When you were employed first by Loew's Inc., or Metro-Goldwyn-Mayer, in 1945, you were employed on a free-lance or on a week-to-week basis, is that not correct?

A. That is correct.

Q. Do you recall whether or not in connection with that employment there was any written contract?

A. I believe that there is a customary release of rights and a standard contract of some sort. I am not sure just what the procedure is in relation to that. Those matters are usually left to one's agent and I believe it is a matter of form and taken care of. I couldn't tell exactly what the papers connected with that particular employment were.

Q. You have had your attention directed by your counsel to paragraph 5 of the term contract which you signed with Loew's, the contract that is sometimes referred to as the morals clause and which I have referred to as the public relations clause and which His Honor has referred to as the public conventions and morals clause, I believe. You know the clause to which I refer? A. Yes, I do.

Q. Can you tell us, Mr. Cole, whether or not in

(Testimony of Lester Cole.)

any contract that you may have had with Loew's Incorporated, prior to entering into this contract, to your own knowledge, [467] that contract or did not contain such a clause?

A. I don't believe that the—well, as I said, I really don't remember exactly what that was, so I couldn't say, the week-to-week contract.

Q. Well, if there was an oral contract, and you said you don't know whether there was an oral contract or a written contract—if there was an oral contract, there was no discussion between you and the employer or anyone representing the employer in regard to the terms, the terms of the contract similar to those of what I call the public relations clause?

A. Well, I tell you, Mr. Walker, when a writer receives an assignment or when I received my assignment to go to work for Metro on a week-to-week basis, the agent usually concludes the arrangements and says, "You report Monday morning. You have a job." And in this particular case I said, "Fine, I am happy to hear it." And there isn't any formality or any close scrutiny of papers in regard to a week-to-week job that I know of. At any rate, it never occurred to me. That is his job, not mine, to make sure that the contract is in order.

Q. At any rate, so far as you recall, there were never any negotiations which involved the provision or provisions similar to that in paragraph 5 in your term contract, is that right?

A. I really don't know whether there was or not, sir. [468]